

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA *
*
vs. * CIVIL ACTION
* NO. 07-12065-JLT
WESLEY GRAHAM *
*
* * * * *

BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
DAY ONE
NONJURY TRIAL

APP E A R A N C E S

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Courtroom No. 22
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
September 9, 2009
10:10 a.m.

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7 ANNA CAROL SALTER

8 By Mr. Savery 41

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10 E X H I B I T S

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12 EXHIBIT: IN EVD.

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14 Nos. 1-28 As reflected on Exhibit List 41

15

16 No. 29 Certificate from D.C. Superior 5656

17 Court with respect to 1974

18 rape charges

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1 **P R O C E E D I N G S**

2 **THE CLERK:** All rise for the Honorable Court.

3 **THE COURT:** Good morning, everybody.

4 **COUNSEL:** Good morning, Your Honor.

5 **THE CLERK:** This is civil action No. 07-12065,
6 United States of America versus Wesley Graham.

7 Counsel please identify themselves for the record.

8 **MR. SAVERY:** Don Savery, Your Honor, for the United
9 States.

10 **MR. GRADY:** Your Honor, Mark Grady as well on
11 behalf of the United States.

12 **THE COURT:** Okay.

13 **MR. SINNIS:** Good morning, Your Honor. Stellio
14 Sinnis on behalf of Mr. Graham.

15 **MR. GOLD:** Ian Gold on behalf of Mr. Graham.

16 **THE COURT:** Okay. And Mr. Graham is here in court.

17 **THE CLERK:** Yes, Judge.

18 **THE COURT:** Are we ready to go?

19 **MR. SAVERY:** We are, Your Honor.

20 **THE COURT:** Okay. Please, everybody, be seated.

21 Do you want to make an opening statement?

22 **MR. SAVERY:** I would like to, Your Honor.

23 **THE COURT:** Go ahead.

24 Excuse me before you start.

25 **MR. SAVERY:** Yes.

1 (Whereupon, the Court and the Deputy Courtroom
2 Clerk conferred.)

3 **THE COURT:** Go ahead.

4 **OPENING STATEMENT BY MR. SAVERY**

5 **MR. SAVERY:** Thank you, Your Honor.

6 The evidence in this case, Your Honor, will show
7 that Wesley Graham is a sexually dangerous person. He is
8 what's known as a sexual specialist. He's a three-time
9 convicted sex offender. And he is a repeated rapist whose
10 mental disorders drive him to reoffend.

11 Since he first committed a rape in 1974, his
12 conduct has followed a predictable pattern. And that
13 pattern has involved committing a sexual offense, going to
14 prison for it, showing no remorse, accepting no sex offender
15 treatment or no psychotherapy of any sort, ultimately being
16 released on parole, and while out of confinement on parole
17 committing yet another sexual offense starting the cycle
18 over again.

19 And it's a predictable pattern of recidivism that
20 has shown itself over and over again in the life of Wesley
21 Graham.

22 And what is more concerning is that the sexual
23 offenses over time become more brutal and more aggressive.
24 They started 35 years ago with the rape of a known victim.
25 They progressed to assaults on strangers. And they

1 progressed ultimately in his latest offenses to brutality,
2 to beatings and strangulation of his victims.

3 The evidence will show Your Honor clearly and
4 convincingly that Mr. Graham should be civilly committed
5 under the Adam Walsh Act.

6 And there are three questions for the Court in this
7 case. The first is has Mr. Graham engaged in sexually
8 violent conduct in the past?

9 The second is does Mr. Graham suffer from a serious
10 mental illness, abnormality or disorder?

11 And the third is as a result of that mental
12 illness, abnormality or disorder would Mr. Graham have
13 serious difficulty refraining from sexually violent conduct
14 if he were released?

15 On the first issue, Your Honor, Mr. Graham has
16 clearly engaged in sexually violent conduct.

17 Mr. Graham was born in 1950. As a juvenile he was
18 incarcerated for a period of time. And as he progressed
19 into his adult years, Your Honor, he began abusing heroin
20 and marijuana. His criminal record reflects a number of
21 arrests and convictions going into his adulthood.

22 In his early 20s, Your Honor, Mr. Graham's criminal
23 focus turned to sex. His first sexual offense took place in
24 1974 and it was a rape. It occurred late on a January
25 night. Mr. Graham was in a Chinese restaurant in

1 Washington, D.C. His victim was there as well. There is
2 evidence that Mr. Graham knew his victim before that night.
3 But in all events, by two o'clock in the morning Mr. Graham
4 offered the victim a ride home. And when he drove her home,
5 at some point they drove off the road. He parked the car
6 and he told his victim, turned to her and told her, I'm not
7 a teenager anymore and I'm going to show you.

8 And then he instructed her to take her clothes off.
9 And when she refused to take her clothes off, Mr. Graham
10 attacked her. He literally tore her clothes off and then he
11 raped her. And in the course of the rape he ejaculated
12 inside and on the victim. It was only after he completed
13 the act that he let her out of the car.

14 She contacted the police. She reported to the
15 hospital. And later that same day Mr. Graham was arrested
16 for rape.

17 He was convicted by a jury in June of 1974 and he
18 was sentenced to 6 to 18 months incarceration. While he was
19 incarcerated he showed no remorse for his conduct. He
20 didn't accept responsibility for his conduct. While he was
21 incarcerated he received no sex offender --

22 **THE COURT:** What was the sentence again?

23 **MR. SAVERY:** 6 to 18 months. He received no
24 treatment of any sort, sex offender or therapy of any sort.

25 He was let out on parole in January of 1975, so

1 approximately six months after the sentencing.

2 In January of 1975 Wesley Graham, an untreated sex
3 offender, was back on the street. And while he was out on
4 parole that didn't stop him from reoffending. His pattern
5 continued and it continued in July of 1975, approximately
6 six months after he was released. This offense took place
7 in a public park on a summer day. And it was a park near a
8 boathouse on the a Potomac River.

9 The victim in this instance was eight months
10 pregnant. And she was walking along one of the trails in
11 the park and she was approached by the offender who attacked
12 her. He assaulted her with the intent to rape her but for
13 some reason he didn't achieve the rape and he left the
14 scene.

15 She reported to the police, she gave them a
16 detailed description of the offender. And Mr. Graham was
17 apprehended a short while later in the area entering his
18 car, fitting the description, his clothes fitting the
19 description given by the victim. And the victim later
20 identified him in person.

21 So the pattern of recidivism is now in full
22 operation and the aggressiveness of the conduct is now
23 increasing. Whereas with the first rape it was a known
24 victim, now this offense is with a complete stranger.
25 Whereas the first event, the first rape took place at night,

1 this one now took place in broad daylight. Whereas the
2 first rape took place in the privacy of a car, this one now
3 takes place in a public park. And whereas with the first
4 rape the victim was an ordinary woman, in this instance
5 she's an eight-month pregnant woman.

6 Mr. Graham pleaded guilty in March of 1976 in the
7 District of Columbia to assault with intent to commit rape
8 and he was sentenced to 4 to 12 years. While he was
9 incarcerated he refused sex offender treatment. He refused
10 to participate in any psychotherapy. He didn't participate
11 in any substance abuse treatment. He showed no remorse for
12 his conduct.

13 Nonetheless, Mr. Graham after serving seven years
14 of that sentence was released on parole. So in October of
15 1982 now Wesley Graham, still an untreated sex offender, was
16 once again back on the street. And while he was released on
17 parole, that didn't stop him from reoffending.

18 The pattern continued. In 1985, Your Honor, Wesley
19 Graham -- sorry -- it was late 1984 when he was arrested for
20 OUI and he was convicted in 1985. In 1985 there was also an
21 arrest for a series of batteries. Approximately three
22 charges of batteries were brought against Mr. Graham. They
23 were all associated with brutal violence and one of the
24 charges was associated with a sexual offense.

25 The charges sprang from three separate incidents

1 over a period of months. All of them relate to his live-in
2 girlfriend Mary P. Mary P. had two adult daughters. And
3 the first event arose when Mr. Graham attempted to hit Mary
4 P. one day. One of the adult daughters intervened.

5 Mr. Graham turned his aggression to the adult daughter. He
6 grabbed her by the throat. He choked her, dragged her into
7 another room in the apartment, had her pinned down on the
8 ground choking her and eventually she was able to break
9 free.

10 The second two events, Your Honor, take place after
11 Mary P. had invasive surgery. In May of 1985 she had a
12 hysterectomy. And after she was released from the hospital
13 she returned home to recuperate. The very next day after
14 her return home Mr. Graham arrived home and he began abusing
15 her. He was first verbally abusive. Then he pushed her
16 around. Then he locked her in a bedroom.

17 Well, one of Mary P.'s adult daughters, actually
18 the other adult daughter was home at the time, she contacted
19 police. The police arrived in his home, spoke to Mr. Graham
20 and then they left.

21 Mr. Graham then turned his aggression on the adult
22 daughter. He told her to leave the apartment. She refused.
23 He threatened to kill her if she didn't leave. She refused.
24 He threw her up against the door and told her that if she
25 didn't leave he was going to knock all of her teeth down

1 here throat. And that's when she finally left.

2 The third incident in this chronology, Your Honor,
3 took place several weeks later. Mary P. is now a few weeks
4 away from her hysterectomy but she is still recuperating.
5 And she was on doctor's orders to abstain from sexual
6 intercourse for several months.

7 The allegations are that Mr. Graham took her car
8 without permission. And then he reported the car stolen and
9 Mary P. didn't believe the car was actually stolen. Well,
10 the police contacted her in around this time. Mr. Graham
11 was home. And when Mary P. spoke to the police, he ran over
12 to her, struck her in the face and he hung up the phone.
13 And then he contacted the police again and explained that
14 the phone had been disconnected.

15 Well, the violence continued the next morning. And
16 the next morning Mr. Graham again abused her, threw her down
17 on the bed, slapped her, and then he demanded that they have
18 sex. And she refused because she was still recuperating
19 from this surgery. Nonetheless he demanded that they have
20 sex. He threatened her. He abused her again physically and
21 then she gave in.

22 Mr. Graham ultimately pleaded guilty to the second
23 of those three battery charges regarding one of the
24 daughters. The other two charges were nolle prossed. But
25 they're all relevant to the issue of his dangerousness in

1 this case. And once again we see the brutality of the
2 sexual offenses increasing in some respects. While again in
3 this instance the victim was known to Mr. Graham, this time
4 he repeatedly struck her. This time he forced sex on her
5 even though she was recuperating from surgery.

6 So the conviction in this case on that second
7 battery resulted in probation for Mr. Graham. He didn't do
8 any time. So after these charges and that conviction
9 Mr. Graham was still an untreated sex offender. He was
10 still out on the street. And even though he was out on
11 parole, that didn't stop him from continuing to reoffend.
12 The pattern continued.

13 In 1986, Your Honor, he tested positive for
14 marijuana on two occasions and PCP on one occasion. And
15 then in May of 1987 he committed his next sexual offense and
16 this was his most brutal sexual offense as far as we know.

17 The victim was an employee of the Department of
18 Defense. And she was at home on a spring day gardening in
19 her backyard. And the evidence is that she was residing in
20 a location near Mr. Graham in the same or adjacent apartment
21 complex. While she was out gardening, Mr. Graham came by
22 and started a conversation. He ended the conversation and
23 he left. He came back presenting her with a plant which he
24 held in his hand which looked like it had been pulled from
25 the ground. She accepted the plant. Mr. Graham went away.

1 The victim then went in her house. And all of a
2 sudden she looked up to see Mr. Graham standing on her patio
3 with his hand against the door. She tried to get him to go
4 away but he forced his way into the apartment. And once he
5 got in the apartment, he approached the victim, put his
6 hands on her throat, and he strangled her into
7 unconsciousness. She lost control of her bladder on the
8 floor. And when she came to, she was in another location in
9 the apartment. When she came to, Mr. Graham put his hands
10 on her throat again and he strangled her into
11 unconsciousness again.

12 When she came to after that event, she woke up in
13 yet another location in the apartment. Mr. Graham repeated
14 his conduct: Put his hands on her throat, choked her into
15 unconsciousness.

16 She finally woke up the third time. Now, in the
17 course of these chokings she at one point tried to resist
18 and he threatened to kill her if she resisted. And that's
19 when she stopped resisting.

20 Well, after she came to the third time, that's when
21 the rapes began. And they began on the floor. Mr. Graham
22 raped her on the floor. And after he finished a short while
23 later he raped her in her own bed. He asked her for her
24 telephone number and she was smart enough to give him her
25 work number and he left.

1 He called her a few days later at her employment at
2 the Department of Defense. She had already contacted the
3 authorities and they were prepared to trace the call, which
4 they did. And they tracked down Mr. Graham and placed him
5 under arrest.

6 So once again we see a continuation of Mr. Graham's
7 pattern of recidivism. And once again the level of
8 brutality increases even more. This time it's with a
9 stranger. This time again it's in broad daylight. This
10 time again he threatens his victim but this time instead of
11 merely beating his victim, he now strangles her into
12 unconsciousness repeatedly.

13 Mr. Graham was convicted of rape in March of 1988,
14 received a sentence of 25 years and was imprisoned in
15 Maryland. Once again he showed no remorse. In fact, he
16 threatened to sue his victim for damages associated with his
17 incarceration.

18 Once again he doesn't participate in sex offender
19 treatment or any psychotherapy. He serves fifteen years of
20 that sentence which was essentially a completion of his
21 sentence in Maryland. By the time he is released from
22 Maryland, his parole on the earlier violation was revoked
23 and he was released into federal custody where he remains
24 today. So he has served out the remainder of his sentence
25 on the assault with intent to commit rape.

Mr. Graham's sentence expired in March of 2007. He's an untreated sex offender. He was set to be released without any conditions, Your Honor. And the Board of Prisons, the Bureau of Prisons --

THE COURT: How does he become a federal prisoner again? What was the choreography there?

MR. SAVERY: Yes. That second conviction for a second offense when he did time, that was in a federal institution. He was released on parole.

THE COURT: Why was it a federal case?

MR. SAVERY: It was in the District of Columbia.

THE COURT: I see. Okay.

MR. SAVERY: So once he was released from Maryland, he went back into federal custody, completed his prison sentence on that second conviction and that's where we stand today.

THE COURT: Okay.

MR. SAVERY: In March of 2007 he was set to be released and the Bureau of Prisons certified him as sexually dangerous and that was the start of our proceedings here.

The testimony in this case, Your Honor, will by and large come from expert witnesses and a major part of that testimony is going to be focused on the second and third issues under the Adam Walsh Act.

Regarding the second issue Mr. Graham does suffer

1 from a serious mental illness, abnormality or disorder. In
2 fact, he suffers from two mental disorders, serious mental
3 disorders.

4 The first one is Antisocial Personality Disorder.
5 And the government's expert witness Anna Salter and the
6 court-appointed examiner in this case Dr. Mills are in
7 agreement that he suffers from that disorder.

8 **THE COURT:** Now, is that a disorder that is
9 included in DSM-IV?

10 **MR. SAVERY:** It is.

11 **THE COURT:** Okay.

12 **MR. SAVERY:** And that diagnosis is clear given his
13 long history of violence, his antisocial conduct and his
14 lack of remorse and so forth.

15 The second is paraphilia. Specifically Paraphilia
16 NOS (Nonconsent).

17 **THE COURT:** Now, is that listed in DSM?

18 **MR. SAVERY:** Paraphilia NOS is listed in DSM. And
19 that is the general category to cover paraphilias that
20 aren't separately identified in that section.

21 **THE COURT:** By "paraphilia," you are saying what?
22 Define that.

23 **MR. SAVERY:** Sure. The Paraphilia NOS is a
24 category called Paraphilia Not Otherwise Specified.

25 The DSM --

1 **THE COURT:** And "paraphilia" means what to me as
2 you are going to argue it?

3 **MR. SAVERY:** Sure. It is an aberrant urge for --
4 sorry -- it's crime motivated by sexual urges. In this
5 instance what the urge in this case is Paraphilia NOS
6 (Nonconsent) and what that means is that he has a recurring
7 intense urge involving nonconsenting persons. And he
8 carries out that urge by committing rapes. Okay.

9 Dr. Salter will explain that, again, this specific
10 type of paraphilia falls within this Paraphilia NOS
11 category. It is supported by scientific studies, scientific
12 research and it's been acknowledged for a long time in the
13 field. In fact, this specific type of paraphilia is
14 referenced in the *DSM-IV Casebook*. And this is a book that
15 essentially takes a variety of the DSM diagnoses and gives
16 examples of them.

17 And one of the examples that is given concerns a
18 repeated rapist such as Mr. Graham. And it explains that
19 this type of paraphilia falls within this category of
20 Paraphilia NOS.

21 And I should note that the authors of this *Casebook*
22 were also involved in the Editorial Board for the *DSM-IV*.
23 It's the same people who prepared the *DSM-IV*. In fact, one
24 of the authors of the *Casebook* was the editor in chief of
25 the *DSM-IV*.

1 It is also worth noting, Your Honor, that, although
2 the respondent argues that Paraphilia NOS (Nonconsent) is
3 not a legitimate diagnosis, every expert who has had any
4 involvement with Mr. Graham in this case has acknowledged
5 that it does exist, starting with the Bureau of Prisons
6 psychologist who examined Mr. Graham in connection with the
7 certification in this case. She filed her report. It's an
8 exhibit in this case. She acknowledged that Paraphilia NOS
9 exists.

10 The Court appointed Dr. Mills as an independent
11 examiner in this case. His report is replete with
12 references to Paraphilia NOS and where it's colloquially
13 called Paraphilic Rapism.

14 Respondent's own expert Dr. Plaud recently
15 testified in his deposition -- we expect his testimony will
16 be consistent in this case -- that he does acknowledge the
17 existence of Paraphilia NOS (Nonconsent).

18 And, finally, Dr. Salter, the government's witness,
19 will explain that, indeed, it does exist and, indeed,
20 Mr. Graham should be diagnosed with Paraphilia NOS
21 (Nonconsent).

22 Mr. Graham's conduct also has signs of another
23 paraphilia, Sexual Sadism. And the repeated strangulation
24 of his last victim is a prime example. His sadistic traits
25 are also relevant to his diagnosis and risk assessment

1 in this case. Your Honor, may I grab my water?

2 **THE COURT:** Sure.

3 (Pause in proceedings.)

4 **MR. SAVERY:** Thank you.

5 Regarding the third issue under the statute, Your
6 Honor, Mr. Graham remains an untreated sex offender. And if
7 he is released, he will have serious difficulty refraining
8 from future sexually violent conduct.

9 On this issue one of the key components of the
10 experts' assessments are actuarial instruments or actuarial
11 tools. And these are tools that take the universe of sexual
12 offenders and then try to designate them or divide them up
13 by their risk of reoffending. And essentially they try to
14 separate the high risk sexual offenders, those who are at
15 high risk for reoffending, from those who are of moderate
16 risk from those who are of the lowest risk.

17 And the most widely used tool in this regard is
18 called the Static-99. Dr. Salter and Dr. Mills, the
19 court-appointed examiner, both scored Mr. Graham on the
20 Static-99 and they both determined that his score falls
21 within the range that represents the highest risk of
22 recidivism on the Static-99.

23 Now, apart from actuarial tools, sex offender
24 assessment also takes into account a number of other
25 factors. One, for instance, is the individual's health and

1 his physical condition. And the evidence will be that
2 Mr. Graham is a fit and healthy individual for a man his
3 age.

4 Another factor is treatment. And that's a critical
5 factor in this case, because, as I have noted, Mr. Graham
6 has historically refused treatment. He's historically
7 refused sex offender treatment. He's refused to participate
8 in psychotherapy. In fact, he was so adamant in his
9 opposition to participating in therapy that he decided to
10 forego an earlier release on appeal on his second conviction
11 because it would have required him to participate in therapy
12 and he had no interest in it.

13 This history of behavior while on release is also a
14 relevant factor and the evidence will be it's abysmal. Each
15 time he's released into the public he commits a more serious
16 sexual offense than the last.

17 Now, we expect you will hear a lot of discussion on
18 the issue of aging and what impact does aging have on a risk
19 assessment. Mr. Graham is 59 years old. Now, as the Court
20 observed in its recent United States versus Hunt decision,
21 the research on aging is not comprehensive and it's not
22 necessarily uniform. But at least one thing is clear and
23 that is that aging affects sex offenders, different types of
24 sex offenders, differently.

25 And there is one line of research that is

1 particularly important here and that concerns sexual
2 specialists. These are individuals like Mr. Graham who have
3 been convicted of a sex offense on at least three occasions.
4 And the research shows that whereas the general population
5 of criminals, their risk of recidivism goes down generally
6 over time, for sexual specialists it actually increases as
7 their age increases.

8 Through his pattern of recidivism, Your Honor,
9 Mr. Graham has proven over and over again that he is unable
10 to refrain from sexually violent conduct when he is released
11 into society. And his prior releases were all on parole,
12 Your Honor, with conditions.

13 He is now set to be released into society, not on
14 parole, with no conditions and with no expectation that he's
15 going to treat the underlying cause of his conduct. If he
16 were released now, he would have serious difficulty
17 refraining from violent conduct.

18 In closing, Your Honor, the government's confident
19 that at the conclusion of this proceeding the Court will
20 find by clear and convincing evidence that Mr. Graham is a
21 sexual specialist, that he is a repeated rapist, a violent
22 rapist, that he suffers from Antisocial Personality Disorder
23 and Paraphilia, and that he would have serious difficulty
24 refraining from reoffending if he were released into
25 society.

1 And finally, Your Honor, that he should be
2 committed under the Adam Walsh Act.

3 **THE COURT:** Okay.

4 (Whereupon, the Court and the Court Reporter
5 conferred.)

6 **THE COURT:** You decided not to have daily copy
7 here?

8 **MR. GRADY:** From the government's perspective, Your
9 Honor, yes, just as a -- but in, if I recall back to Hunt,
10 what we had done was a one-week requested expedited at the
11 conclusion of the proceedings. I had expected --

12 **MR. SINNIS:** Your Honor, I think we'll order daily
13 transcripts if that would be of aid to the Court.

14 **THE COURT:** Well, I am just thinking of everybody.
15 In other words, the sooner we get the transcripts, the
16 sooner we get the proposed findings of fact and the sooner
17 you get a decision.

18 **MR. GRADY:** Absolutely.

19 **MR. SINNIS:** Barring --

20 **THE COURT:** I am not telling you what to do. I was
21 inquiring from Carol whether you had done anything.

22 **MR. SINNIS:** Barring being reprimanded by
23 Ms. Conrad, we will order daily transcripts.

24 **THE COURT:** You know the old saying: It is easier
25 to ask forgiveness than to get permission.

1 (Laughter.)

2 **MR. SINNIS:** Then we will order daily transcripts
3 and beg for forgiveness.

4 (Whereupon, the Court and the Court Reporter
5 conferred.)

6 **THE COURT:** She will do it expedited for you. She
7 doesn't have help to give you daily. Is that all right?

8 **MR. SINNIS:** Of course.

9 **MR. GRADY:** Just with the caveat the government
10 does need to request for approval, but I will let her know
11 as fast as I know.

12 **THE COURT:** Okay. All right. And I am not
13 ordering anybody to do anything. If you don't think it is a
14 good tactic, then don't do it.

15 All right. Go ahead now with your opening.

16 **OPENING STATEMENT BY MR. SINNIS**

17 **MR. SINNIS:** Thank you, Your Honor.

18 Your Honor, first the facts and then the science.

19 In terms of the facts, what we have here with
20 Mr. Graham are, notwithstanding what Mr. Savery just said,
21 three instances, well, four instances and let's take them
22 one by one.

23 In 1974 Mr. Graham lives next door to a woman named
24 Cynthia Foreman. On a particular night he drives
25 Ms. Foreman home and he has sex with her and she makes an

1 allegation that it was rape. She is known to him. They've
2 known each other for some time.

3 He is found guilty of that charge. And as Your
4 Honor very astutely noticed, he was sentenced to 6 to 18
5 months. I think that type of sentence sends a signal as to
6 what that particular trial judge felt about that particular
7 case. The only thing we know about that case, and this is
8 extremely important with all of these allegations that are
9 being made by the government, is, except as to the very last
10 one, there is a paltry amount of documents as to what
11 actually took place.

12 So for the rape of Cynthia Foreman, notwithstanding
13 this case went to trial, you have in total a one-paragraph
14 police report description of what happened. That is it.
15 And it says, as Mr. Savery said, she said that he tore her
16 clothes off, forced her to have sex. He then goes to trial
17 and he is found guilty and does 6 to 18 months.

18 In 1975 the second assault with intent to rape,
19 again, very important, not a rape, assault with intent to
20 rape. The only -- you will learn nothing, after three days
21 of trial, four days of trial, you will learn nothing about
22 what Mr. Graham did in that event because there is not a
23 single piece of paper, not a single piece of evidence that
24 tells us what Mr. Graham did.

25 In that one we have even less than what we had in

1 the case of Cynthia Foreman. All we know about that case is
2 the woman was pregnant and she was on a path in Washington,
3 D.C., on a towpath down by a river. And her original
4 allegation to the police was that she had been assaulted.
5 That is what the report says, that she had been assaulted.
6 She didn't say she had been assaulted with intent to commit
7 rape. She said she had been assaulted. We don't know what
8 that assault was. We don't know whether he chased after
9 her. We don't know whether he grabbed her. We don't know
10 whether he didn't even touch her but just scared her.

11 We know not a single fact now and you will not know
12 a single fact at the end of this trial as to what Mr. Graham
13 did on that day. And yet the government and its expert want
14 you to make leaps of faith and assumptions like their expert
15 does as to what he did. But the simple fact is we don't
16 know what he did.

17 He was found guilty of that charge. He pled guilty
18 to that charge and he served time in prison. He gets out of
19 prison. And Mr. Savery spent a long time speaking about a
20 series of battery charges regarding Mary Phargood who is the
21 lifelong partner of Wesley Graham. You will hear from
22 Wesley Graham's nephews in this case. They will tell you
23 that Mr. Graham still speaks to Mary Phargood on a weekly,
24 every couple weeks basis. They're still friendly. They
25 still keep in touch. She's been a very strong sense of

1 support to him while he's been in prison. And you will hear
2 that through the nephews.

3 And Mr. Savery spent a lot of time about that
4 allegation. Here's what we know about that. We know that
5 ten months after it is alleged that Mr. Graham assaulted two
6 of Mary Phargood's daughters and assaulted her, that was the
7 first time that allegation ever came to light. They didn't
8 make the allegation on the night of the alleged incident.
9 They didn't make it the next day. They didn't make it the
10 next day. They didn't make it the next month. They made it
11 ten months later.

12 And the only records we have about that of someone
13 who is actually there and is a neutral party was his
14 probation officer. And his probation officer, who I submit,
15 Your Honor, would agree, he's probably not looking to cut
16 Mr. Graham a break, investigated those allegations. And the
17 allegations were as Mr. Savery said. There is allegations
18 that he physically harmed the two daughters. Not in a
19 sexual way but physically harmed them, dragging them out of
20 the house, dragging them out of a particular room.

21 And then there is an allegation that he forced
22 Ms. Phargood to have sex with him after she had undergone a
23 hysterectomy against medical orders. But, again, not
24 alleged until ten months later.

25 And what you will hear, that the parole officer

1 Joseph Murray who actually investigated it for the Parole
2 Commission, he says, "It should be noted the alleged
3 incident took place approximately ten months ago. It would
4 appear she," referring to Mary Phargood, "is reacting to the
5 loss of her automobile and is distressed over his," meaning
6 Mr. Graham's, "admitted involvement with another woman."

7 The parole officer didn't believe it. The Court
8 didn't believe it. The charge was nolle prossed. It's of
9 zero value. And the fact that their expert wants to rely on
10 it to put him in jail for the rest of his life or civilly
11 commit him for the rest of his life I think gives you a
12 sense and an idea of what their expert is willing to do in
13 terms of bending facts, assuming facts and ignoring facts in
14 order to get to an endgame.

15 Now, I will talk about that more when we talk about
16 the science. So I think those are red herrings.

17 Ten months after the event, that's when they're
18 first alleged, the parole officer investigates, says I don't
19 believe it. The court says we don't believe it, nolle
20 prossed, done.

21 Continuing to try to get as candid as I can with
22 Your Honor, there is a third charge here, the rape, the
23 index offense for lack of a better word. That is a violent
24 offense. Brutal. He chokes his victim. He repeatedly
25 rapes her. He drags her around her own home. No excuse.

1 Heinous act. He's been in prison for 22 years. That seems
2 like a sufficient sentence.

3 Because he raped someone 22 years ago does not mean
4 he currently suffers from a mental disease or disorder that
5 requires his confinement. He has done a substantial period
6 of prison time. He's 60 years old. There is not going to
7 be sufficient evidence on the facts of the case to commit
8 him at the end of this case.

9 So those are the facts to try to lay it a little
10 more clearly.

11 Now, in terms of the science, Your Honor, I want to
12 quote -- the government is going to call Anna Salter. And
13 Anna Salter wrote, "A basic tenant of science is that if the
14 facts don't support the theory, the theory should give way.
15 It often simply does not happen. Sometimes the facts are
16 twisted to fit the theory or if that fails, they're simply
17 ignored."

18 Ironically she wrote that. She wrote that in a
19 book called, *Predators, Pedophiles, Rapists and Other Sex*
20 *Offenders, Who They Are, How They Operate and How We Can*
21 *Protect Ourselves and our Children.*

22 I say ironically because at every turn of this case
23 Anna Salter does exactly what she excoriates people not to
24 do. She ignores the science when needed. She ignores facts
25 or she assumes facts such as what Mr. Graham might have done

1 in that assault with intent to commit rape in order to fit
2 her diagnosis.

3 She writes fiction books. And frankly the title of
4 the back I just quoted you and of her fiction books, it
5 becomes very clear that at the end of the day she is finding
6 ways to fit science and fit facts to commit people civilly.

7 There are three discrete issues in this case, Your
8 Honor, as we see them. One --

9 **THE COURT:** When you talk about her writing
10 fiction, are you being facetious or --

11 **MR. SINNIS:** No. No, I am not being facetious,
12 Your Honor.

13 **THE COURT:** All right. No, that is okay.

14 **MR. SINNIS:** We have them here. You will see them
15 when Mr. Gold cross-examines her.

16 **THE COURT:** Okay.

17 **MR. SINNIS:** She has written probably this high
18 (indicating), a foot and a half high of fiction novels about
19 sexual predators and sex offenders.

20 We think there are three discrete areas of issue
21 for Your Honor to decide in this case. One is does
22 Paraphilia Not Otherwise Specified (Nonconsent) exist as a
23 valid scientific diagnosis; and if it does, is it applicable
24 in this case?

25 Two, is Antisocial Personality Disorder standing

1 alone sufficient for civil commitment under the Adam Walsh
2 Act? A question that Chief Judge Wolf recently answered in
3 the negative in the case of U.S. v. Wilkinson.

4 And, thirdly, does the fact that Mr. Graham is 59
5 and a half years old reduce his risk of recidivism of
6 reoffending?

7 On each and every one of those questions the
8 evidence will show that the government's only witness Anna
9 Salter ignores the science but not only ignores it, she
10 rejects it. She rejects it.

11 The authors of the DSM, Your Honor asked
12 Mr. Savery is it in the DSM? Paraphilia NOS (Nonconsent) is
13 not in the DSM. And Mr. Savery very artfully somewhat
14 dodged that question and then said, well, it's in the
15 Casebook. It's not in the DSM.

16 Not only is it not in the DSM, it was specifically
17 considered and rejected by the authors of the DSM for
18 inclusion. And let me give Your Honor a little bit of
19 background on that.

20 Between 1983 and 1986 there was strenuous debate
21 about whether or not the DSM should include a specific
22 diagnosis for adult stranger rape with nonsadistic aspects
23 to it. Prior to this time there was never anywhere in the
24 DSM a mental disorder, disease or condition that would apply
25 to -- and I don't mean this in any type of condescending

1 way -- but your garden variety rapist. There was nothing in
2 the DSM that would apply to that.

3 And so certain people said we need something, we
4 need something in the DSM that discusses why people commit
5 the crime of rape. So the authors of the DSM after much
6 consideration and debate took the issue up. They took it up
7 and they answered the question. And they said no,
8 Paraphilia NOS (Nonconsent) does not belong in the DSM
9 because it is not scientifically substantiated.

10 And just so Your Honor is clear as the trial is
11 going on, Paraphilia NOS (Nonconsent) is also referred to by
12 some different names: Paraphilic Rapism or Paraphilic
13 Coercive Disorder, PCD. They all mean the same thing. They
14 were rejected from inclusion in the DSM.

15 The American Psychiatric Association said it
16 shouldn't be in there. The National Association of Women
17 said it shouldn't be in there. And quite interestingly the
18 Department of Justice said it shouldn't be in there. And
19 they all said it shouldn't be in there because the science
20 was clear, rape is not about sex. It is about power. It is
21 about aggression. It is not about sexual arousal. It's not
22 a mental disorder. It is not caused by a mental disorder.
23 Keep it out of the DSM, and they did.

24 But the government's only witness in this case says
25 it doesn't matter if it is in the DSM or not. It's in this

1 Casebook, a Casebook that is not part of the DSM. It is not
2 referenced by the DSM. And, in fact, the Casebook portion
3 that Mr. Savery mentioned has been revised in a new edition.
4 And you know what, lo and behold, Paraphilia NOS, not in
5 there, not in there. So it's not even in the most recent
6 version of the Casebook and it's not in the DSM itself.
7 But, again, Ms. Salter doesn't care about that because this
8 is her diagnosis of Wesley Graham and this is her way to get
9 Mr. Graham civilly committed.

10 So notwithstanding the fact that the American
11 Psychiatric Association and the authors of the DSM say it
12 doesn't get included, Anna Salter says I think it's a valid
13 diagnosis. I think it should be in the DSM. And she turns
14 to a friend of hers, a personal friend of hers, Dennis
15 Doren, who is a fellow psychologist in Wisconsin, and
16 Dennis, and she says to Dennis Doren what do we do about
17 these people. What do we do about adult rapists, adult
18 stranger victims.

19 And Dennis Doren created Paraphilia NOS
20 (Nonconsent.) And he is unabashed about it. He's testified
21 under oath, and you will hear evidence, he's testified under
22 oath --

23 **THE COURT:** He is a what?

24 **MR. SINNIS:** He's not a witness in this case. He
25 is a friend of Dr. Salter's --

1 **THE COURT:** Who does what?

2 **MR. SINNIS:** Who created the Paraphilia NOS
3 (Nonconsent) diagnosis.

4 **THE COURT:** What does he do for a living?

5 **MR. SINNIS:** He used to work for the Wisconsin
6 Department of Probation.

7 **MR. GOLD:** Wisconsin Department of Public Health.

8 He does this work. This is what he does. He wrote a book
9 called *Evaluating Sex Offenders* which is about seven years
10 old but is popular.

11 **THE COURT:** And his credentials are what?

12 **MR. SINNIS:** He's a psychologist.

13 **THE COURT:** A psychologist.

14 **MR. SINNIS:** He's a psychologist. And a colleague
15 and friend of Anna Salter's.

16 **THE COURT:** Okay.

17 **MR. SINNIS:** And so in a trial he testified under
18 oath that the psychiatric community did not recognize this
19 disorder and that he created it himself because he perceived
20 a gap in the DSM. He perceived a gap in the DSM.

21 There wasn't any gap in the DSM. Rather there was
22 a deliberative process and a reasoned scientific conclusion
23 was reached that paraphilic rapism was not a scientifically
24 valid diagnosis worthy of placement in the DSM. That's not
25 a gap. That's a decision, a decision Anna Salter doesn't

1 like, a decision that her colleague Dennis Doren didn't
2 like, but it was a decision made by psychiatrists who are
3 more expertise in the field than psychologists who played a
4 circuit of coming in and testifying in civil commitment
5 proceedings.

6 But apparently Dennis Doren and Anna Salter believe
7 they know better than the American Psychiatric Association.
8 They know better than the authors of the DSM.

9 Simply put the evidence in this trial will show
10 that the overwhelming position in the scientific community
11 is that such a diagnosis is not worthy of inclusion in that
12 book, the DSM, and not worthy of diagnosing people with.

13 And let me say one more thing before I forget.

14 Mr. Savery said in his opening that the Bureau of Prisons in
15 their certification of Mr. Graham, which was performed by a
16 Ph.D Monica Ferraro, diagnosed him with Paraphilia NOS
17 (Nonconsent).

18 **MR. SAVERY:** Your Honor, I'm objecting. I didn't
19 represent that he was diagnosed with it. I merely
20 represented that they acknowledged the diagnosis.

21 **MR. SINNIS:** Well --

22 **THE COURT:** Well, we will hear what the evidence
23 is.

24 **MR. SINNIS:** What she specifically said is, Rule it
25 out. I don't have enough information.

1 The whole point of Paraphilia NOS (Nonconsent) is
2 based upon the fact that the person committing the rape is
3 aroused by the nonconsent of the victim. That's it. That's
4 as clear as I can put it. If a rapist is aroused by the
5 nonconsent of the victim, then people like Anna Salter will
6 get on the stand and say they suffer from Paraphilia NOS
7 (Nonconsent).

8 Well, interestingly, Dr. Ferraro, the Bureau of
9 Prisons Ph.D who evaluated Mr. Graham, says in her report,
10 "While records indicate that Mr. Graham choked his victim
11 while committing the rape in 1987, there is no indication
12 that Mr. Graham derived sexual pleasure from the pain of his
13 rape victim. Rather, it appears as though the aggression
14 associated with Mr. Graham's offense conduct was to subdue
15 his victim so that he could rape her."

16 She rejects the only criteria that Anna Salter says
17 is necessary to diagnose someone with this illness. She
18 rejects it. The Bureau of Prisons expert rejects it.

19 Now, even if, even if Paraphilia NOS (Nonconsent)
20 is a valid diagnosis, it has no place in this case. There
21 are absolutely no facts, as I just indicated, that, Ph.D
22 Ferraro also indicates, there are no facts in this case to
23 justify its application to Mr. Graham.

24 Now, there are people, and Mr. Savery alluded to,
25 in the scientific community who accept this diagnosis,

1 Paraphilia NOS (Nonconsent). They're in the minority but
2 there are those who accept it. But interestingly even the
3 people who accept it vehemently disagree with Anna Salter
4 and Dennis Doren's indiscriminate application of this
5 diagnosis to any and all adult stranger rapists. Those
6 individuals specifically say, and you will hear testimony to
7 this effect, that if you are going to apply this diagnosis,
8 it should be applied to rapists with "extreme caution" and
9 only applied, "when there is considerable evidence that the
10 rapist is motivated by his victim's nonconsent."

11 There is nothing in this record whatsoever to
12 indicate that Mr. Graham was motivated by his victims'
13 nonconsent.

14 So not only is the position espoused by Anna Salter
15 an outlier within the scientific community as a whole, it's
16 also an outlier even among those people in that community
17 who accept this diagnosis. And if, quite simply, the
18 extremity of the view would stand for the proposition that
19 if accepted by this Court that any adult stranger rapist
20 suffers from a mental illness and is justified to be
21 committed under the Adam Walsh Act, the science doesn't
22 condone that nor should the law.

23 The second issue which I mentioned is whether
24 Antisocial Personality Disorder standing alone is sufficient
25 to justify the commitment of Mr. Graham under the Adam Walsh

1 Act. As I indicated, that exact issue was presented in the
2 Wilkinson case in this district and was answered in the
3 negative, that it was not sufficient.

4 Now, Mr. Graham has been diagnosed with Antisocial
5 Personality Disorder. As Your Honor knows, probably 50, 60
6 percent of prisoners have Antisocial Personality Disorder.

7 So Dr. Salter says he has Antisocial Personality
8 Disorder. Dr. Mills who is the court-appointed expert says
9 he has Antisocial Personality Disorder. Where they differ
10 from is what is the endgame about that. What does that give
11 us. What does that mean to us to say.

12 Dr. Mills who testified in Wilkinson takes the
13 position as a psychiatrist that Antisocial Personality
14 Disorder standing alone is not sufficient basis to civilly
15 commit someone under the Adam Walsh Act. It is not a
16 serious mental illness, disorder or condition. It's on the
17 Axis II, not Axis I, and the disorders are just
18 substantively and qualitatively different than those that
19 you find, for example, say pedophilia or any of the other
20 paraphilic disorders. They're just different and they're not serious
21 mental illnesses or conditions or disorders. And,
22 therefore, they don't justify the commitment of Mr. Graham.

23 And as I said, he testified in the Wilkinson case.
24 And in response, in his decision Chief Judge Wolf said, "The
25 government had not proven that ASPD alone ever, ever causes

1 a person to have serious difficulty in controlling his
2 conduct."

3 **MR. SAVERY:** Your Honor, I'm going to object to
4 this line. We're now commenting on another judge's
5 determination based on the evidence presented to that judge
6 in another case. I am not sure how it relates to this case.

7 **THE COURT:** Well, I think it is of interest. I
8 want to know what my colleagues did on the issue. Thank
9 you.

10 **MR. SINNIS:** Yet again Anna Salter, in the face of
11 the majority of the scientific community and against legal
12 decisions on point, will opine that there is absolutely no
13 reason why Antisocial Personality Disorder can't justify the
14 civil commitment of Mr. Graham or any other. The Court
15 should reject this position.

16 But, again, even if the Court were to accept that
17 ASPD standing alone is sufficient in some circumstances to
18 civilly commit someone under the Adam Walsh Act, as applied
19 in this case, again, the facts don't rise to the level of
20 Mr. Graham's ASPD indicating that he has serious difficulty
21 from refraining from future illegal conduct or sexual
22 offending. And I say that because, for two reasons.

23 One, Mr. Graham is 59 and a half years old. And,
24 two, he has an almost unblemished prison record for the last
25 22 years that he has been incarcerated. A couple isolated

1 disciplinary incidents but other than that he has worked.
2 He's abided by the rules of the institution. He has minded
3 his own business and hasn't bothered anybody.

4 The literature and science unequivocally states
5 that ASPD actually diminished over the lifespan of an
6 individual. This is such a commonly known fact that the
7 psychiatrists in the field have given it a name: Burnout.
8 Basically meaning the older you get, the less these traits
9 come to the fore and the less these traits have any ability
10 to cause you some desire to do some illegal conduct.

11 But, again, Dr. Salter refuses to concede that.
12 She says age has nothing to do with his ASPD. She says, oh,
13 the fact that he spent 22 years in prison and didn't do
14 anything wrong, that doesn't count either.

15 So, again, she's twisting the facts or ignoring the
16 facts or ignoring the science in order to get to her endgame
17 which is that he needs to be civilly committed.

18 And finally we come to age. And I think this one,
19 you know, there is a lot of science on this and I know Your
20 Honor heard a lot of it in the Hunt case. I come at this
21 from more of a common sense standpoint. I think there --
22 Your Honor has been a federal court judge since 1972. I
23 have been a criminal defense attorney for 18 years. 60-year
24 old men are rare to be seen in a courtroom. And I think
25 science tells us that. I think if you look at the prison

1 population across this country you will see that. That
2 offenders at the age of offense are younger, not older.

3 If you look at the FBI, which we will submit to
4 Your Honor, the FBI 2007 Uniformed Crime Reports, there were
5 17,136 arrests for forcible rape in 2007. 1.7 percent of
6 those are people over 60.

7 Clients and defendants come in all shapes, types
8 and sizes but they rarely come in the form of a 60-year old
9 person. I think that is just common sense, that as we get
10 older or as people age, they commit less offenses, less
11 criminal conduct.

12 Dr. Salter won't accept that. She says age has
13 nothing to do with whether someone will reoffend. She says
14 Wesley Graham is likely today at 59 and a half to go out and
15 commit a rape as he was at 29, 30, 35. That flies in the
16 face of science. It flies in the face of common sense but
17 that is what she's going to tell Your Honor.

18 And I'd like to just end with one final point. We
19 talked about how she's reached her conclusions and opinions.
20 But quite surprisingly the night before her deposition, the
21 night before her deposition in this case she emails a friend
22 of hers, David Thornton. She gives him a nine-line
23 inaccurate factual description of Mr. Graham's history, nine
24 lines on a computer. Condensed his life to nine lines and
25 sent it to her friend David Thornton who is also a

1 psychologist in Wisconsin and said to him what do I do? She
2 asked him, How much would you weigh his age, quote/unquote?
3 What do you think of a six on a Static given the new norms,
4 quote/unquote?

5 The government asked her to formulate a scientific
6 opinion of Mr. Graham but rather than do that, to apply fine
7 science and research, she emails a friend the night before
8 and says, What do you think? That's the government's
9 expert. That's the government's case.

10 And that is how she twisted the facts and theories
11 in order to reach the conclusion that Mr. Graham is a
12 sexually dangerous person. We submit that's not science and
13 that's certainly not proof beyond -- proof by clear and
14 convincing evidence.

15 Thank you, Your Honor.

16 **THE COURT:** Okay.

17 **MR. SAVERY:** Your Honor, the government calls Anna
18 Salter.

19 **THE COURT:** Go ahead.

20 **MR. SAVERY:** And, Your Honor, I have a set of
21 exhibits which the parties have agreed to with stipulated
22 numbers 1 through 28. I'd offer those.

23 **THE COURT:** Okay. Any objection?

24 **MR. SINNIS:** No, Your Honor.

25 **THE COURT:** Okay.

1 (Whereupon, Exhibits No. 1 to 28 were received in
2 evidence with the descriptions being found on the Trial
3 Exhibit List.)

4 (Whereupon, counsel conferred.)

5 **MR. SAVERY:** I'd like to give a set to the Court.

6 **THE COURT:** Okay. Give them to Suzie here.

7 **MR. SAVERY:** I will put a set on the witness stand
8 as well.

9 Your Honor, I will note that the --

10 **THE COURT:** Just give me one minute. I am working
11 on something that has nothing to do with this case.

12 **MR. SAVERY:** Sure.

13 (Pause in proceedings.)

14 **THE CLERK:** Would you raise your right hand,
15 please.

16 **ANNA CAROL SALTER, Sworn**

17 **THE CLERK:** Thank you. You may be seated.

18 **DIRECT EXAMINATION**

19 BY MR. SAVERY

20 **Q.** Good morning.

21 **A.** Good morning.

22 **Q.** Would you please state your full name.

23 **A.** Anna Carol Salter.

24 **Q.** And what is your occupation, Dr. Salter?

25 **A.** I am a psychologist.

1 **Q.** And have you been retained by the government in this
2 case to provide your opinions concerning the sexual
3 dangerousness of the respondent Wesley Graham?

4 **A.** Yes.

5 **Q.** There are two binders of exhibits to your right. If you
6 could take binder one, please. Turn to Exhibit 1.

7 Is that a copy of your report that you prepared in
8 this case?

9 **A.** Yes.

10 **Q.** Okay. And if you would turn to Exhibit 2 in that same
11 binder.

12 **A.** Right.

13 **Q.** And what is that?

14 **A.** That is an addendum to the report which I wrote after
15 some of the norms for the Static, one of the instruments
16 that I used, was changed, were changed.

17 **Q.** Okay. Have you reached an opinion in this case to a
18 reasonable degree of professional certainty as to whether
19 Wesley Graham meets criteria for a civil commitment under 18
20 U.S.C. Sections 4247 and 4248?

21 **A.** Yes.

22 **Q.** Could you please identify for us what those criteria
23 are?

24 **A.** The criteria for a sexually dangerous person are that
25 the person has engaged or attempted to engage in sexually

1 violent conduct and that they have -- and they are sexually
2 dangerous to others. "Sexually dangerous to others" has
3 been further defined as the person suffers from a serious
4 mental illness, abnormality or disorder as a result of which
5 he would have serious difficulty in refraining from sexually
6 violent conduct or child molestation.

7 **Q.** Okay. Thank you.

8 Before we get to the substance of your opinions,
9 I'd like to focus for a few minutes on your background.

10 Can you just quickly walk us through your
11 educational history.

12 **A.** I have a BA from the University of North Carolina in
13 philosophy and English. I have a master's degree from Tufts
14 University in child study. And I have a Ph.D from Harvard
15 University in clinical psychology and public practice.

16 **Q.** If you could turn to Exhibit 3 in that binder, please.

17 Is this a copy of your CV?

18 **A.** Yes.

19 **Q.** Okay. Are you a licensed psychologist?

20 **A.** I am.

21 **Q.** And when did you first become licensed?

22 **A.** I believe it was in the late '70s in New Hampshire.

23 **Q.** And where are you currently licensed?

24 **A.** Wisconsin.

25 **Q.** For how long have you been licensed in Wisconsin?

1 **A.** Since 1996.

2 **Q.** Have you been continuously licensed as a psychologist
3 since the time you were first licensed in New Hampshire?

4 **A.** Yes, I was licensed in New Hampshire. And then because
5 I was also working in Vermont, I obtained a Vermont license
6 and held both of those licenses until I moved to Wisconsin
7 in 1996.

8 **THE COURT:** That is fresh water there.

9 **THE WITNESS:** Thank you.

10 **THE COURT:** And the cups are clean I think.

11 (Laughter.)

12 **THE COURT:** Right?

13 **THE LAW CLERK:** Yes.

14 (Pause in proceedings while the witness drank some
15 water.)

16 BY MR. SAVERY

17 **Q.** Have you had any clinical experience relating to sex
18 offenders and victims?

19 **A.** Yes.

20 **Q.** Okay. Can you briefly describe your relevant experience
21 for us?

22 **A.** I first began assessing and treating sex offenders and
23 victims when I began clinical practice which was in the late
24 '70s. I began by treating victims and then offenders began
25 to come into the facility where I was working. And I

1 subsequently obtained a grant and studied offender programs
2 in different places in the country to determine the best
3 treatment for offenders.

4 I began to treat offenders and I continued to treat
5 victims and offenders until I moved to Wisconsin in 1996.
6 Since that time -- and I continued to see clients for the
7 first couple of years. But since around 1998 I have focused
8 particularly on assessment of sex offenders and I do other
9 professional activities but clinically I focus on the
10 assessment of sex offenders.

11 Q. Okay. And what type of work are you doing in that
12 regard?

13 A. Well, first of all, I consult half time to the
14 Department of Corrections in Wisconsin. And as part of that
15 job I, on a weekly basis I assess sex offenders in one
16 facility and then violent offenders in a second facility. I
17 also do other jobs for the Department of Corrections.

18 Second, I have an ongoing contract with the State
19 of Iowa to do civil commitment evaluations of sex offenders.
20 And on occasion I have done them in Wisconsin. It's
21 typically not my responsibility in Wisconsin; but when they
22 have overflow or they need a second opinion, I have done
23 some evaluations in Wisconsin and some in other states as
24 well.

25 Q. Okay. Now, have you had any teaching experience that

1 concerns sex offenders?

2 **A.** That concerns sex offenders?

3 **Q.** And victims.

4 **A.** And victims. I train -- well, first of all, I was a
5 teaching fellow at both of my graduate schools but neither
6 of them had any courses in the sexual piece (ph.) so I did
7 not train or teach on sex offenders or victims at either
8 Harvard or Tufts.

9 However, after moving into clinical practice I,
10 within a few years I joined the faculty of Dartmouth Medical
11 School and I was on the faculty of psychiatry and maternal
12 and child health as a joint appointment. And during that
13 time I was director of psychosexual education for the
14 pediatric residency training program. In that capacity I
15 trained pediatric residents on a variety of subjects and one
16 of them was sexual abuse.

17 I was also at that time assistant director of the
18 Children at Risk Program which was Dartmouth's child sexual
19 abuse program. And I was also involved in teaching and
20 training activities through that.

21 In addition I also trained in different parts of
22 the country and abroad on sex offenders and victims.

23 **Q.** Okay. Are you able to estimate how many sex offenders
24 you've clinically treated?

25 **A.** I never kept a list. I saw them pretty continually for

1 roughly twenty years but I never kept a list of my clients.

2 **Q.** How about victims of sex offenses?

3 **A.** The same thing, I have never kept a list.

4 **Q.** How many individuals have you evaluated in civil
5 commitment cases over the course of your career?

6 **A.** I did keep a list of that. I have I believe 65 cases
7 that I have done civil commitment evaluations in.

8 **Q.** Are those cases prescreened by the time they come to
9 you?

10 **A.** They are prescreened. Only the very small percentage of
11 sex offenders are referred for evaluation. No state that I
12 am aware of civilly commits more than ten percent of sex
13 offenders. And typically they're between 10 and 20 percent
14 of the highest risk sex offenders are referred for
15 evaluation. The rest are not.

16 **Q.** Okay. So you see only the highest risk sex offenders?

17 **A.** Yes.

18 **Q.** Okay. And roughly what percentage of those have you
19 found to be qualifying as sex offenders?

20 **A.** About half, 51 percent.

21 **Q.** Have you testified as an expert in sex offender
22 commitment proceedings?

23 **A.** Yes.

24 **Q.** And how many?

25 **A.** 23 times, 23 cases.

1 **Q.** In how many states or jurisdictions?

2 **A.** Well, several. Iowa, Wisconsin, one, two, four states.

3 **Q.** Okay. Have you ever failed to qualify as an expert
4 witness?

5 **A.** No.

6 **Q.** You mentioned some trainings that you have done apart
7 from your work within academic posts. Can you just tell us
8 briefly what areas you have conducted trainings in that are
9 relevant to this case and who your audiences were?

10 **A.** Well, the audiences typically are a variety of
11 professionals who deal with sexual abuse. They often
12 include mental health personnel. They include correctional
13 personnel, probation and parole, police, attorneys, judges,
14 child protection education, roughly anyone or any
15 professionals who deal with sexual abuse come to these
16 trainings.

17 **Q.** Okay. And have you received any grants in the field of
18 sexual abuse or concerning sex offenders?

19 **A.** I have received a series of grants. When I was at
20 Dartmouth Medical School along with a pediatrician named
21 Steve Kerry (ph.) we essentially financed the child,
22 Children at Risk Program through grants over a number of
23 years.

24 **Q.** Okay. And have you published any books or articles in
25 the field of sexual abuse or concerning sex offenders?

1 **A.** I published three books on sex offenders. Two are
2 academic books and the third I wrote for a more general
3 audience.

4 I published *Treating Child Sex Offenders and*
5 *Victims, A Practical Guide* in 1988. That was a nuts and
6 bolts guide to assessing and treating sex offenders.

7 I also published a book called *Transforming Trauma*
8 in the mid '90s on. And that was a book for adult
9 survivors -- not for adult survivors -- for professionals
10 about how to understand and treat adult survivors. But in
11 that book a good section, a very large section was devoted
12 to the dynamics of sex offenders because it was my belief
13 that many treatment providers for victims did not understand
14 sex offenders and the dynamics of molestation and rape and
15 that that hindered their ability to treat a survivor. So
16 the book actually had quite a lot to do with sex offenders.

17 And then I published a book called *Predators,*
18 *Pedophiles, Rapists and Other Sex Offenders*. And that book
19 was designed for the general public but I have been
20 surprised by how many professionals use it as well.

21 **Q.** Okay. And you've published other writings in the area
22 of sex offense and sex offender treatment; is that right?

23 **A.** Yes, but I primarily collect my work and publish it in
24 books.

25 **Q.** Okay. In all events, are your writings listed in your

1 CV?

2 **A.** My writings are listed in the CV except for the book
3 that I am currently starting working on on treatment.

4 **Q.** Okay. And are you also a novelist?

5 **A.** Yes. I have published five mysteries.

6 **Q.** Now, have you produced any educational films in the area
7 of sex offenders?

8 **A.** I have. I have produced several. The two that I have
9 out now are *Truth, Lies and Sex Offenders*. And this is a
10 film in which both -- all my films are films of sex
11 offenders talking about certain issues, the issues on the
12 film.

13 *Truth, Lies and Sex Offenders* is about how sex
14 offenders fool people, how they fool clinicians, how they
15 fool community members, how they fool victims. And it is a
16 series of sex offenders describing the techniques that they
17 use.

18 I also have a film out now on *Sadistic and*
19 *Nonsadistic Offenders, How They Think and How They Operate*,
20 which includes a sadist describing his thinking process and
21 his behavior.

22 And I have a new one coming out as well on *The*
23 *Dynamics of Sexual Molestation*.

24 **Q.** Are you a member of any professional associations
25 relating to sex offenses specifically?

1 **A.** Yes, the Association for the Treatment of Sexual
2 Abusers.

3 **Q.** Have you received any awards for your work in the area
4 of sex offenses?

5 **A.** In the area of sex offenses I received a significant
6 achievement award from the Association for the Treatment of
7 Sexual Abusers which they gave to one person each year.

8 **Q.** And when did you receive that award?

9 **A.** 1997.

10 **Q.** I'd like to turn your attention now to this case against
11 Wesley Graham. What was your assignment in this case?

12 **A.** My assignment was to evaluate from the records
13 Mr. Graham and to determine if he met the specified criteria
14 and I was asked to critique the report of Dr. Mills in the
15 light of this case.

16 **Q.** Okay. How did you go about handling that assignment?

17 **A.** Well, I asked to see all the records. And then the
18 process is that I set aside records that are not
19 specifically related to the sexual offender and the
20 evaluation. I then developed a notebook in which I put
21 each, information about each offense in one section, his
22 reports, et cetera, in another. And I get all the material
23 organized.

24 Then I look for diagnoses. I look for whether or
25 not this person does or does not have a diagnoses that would

1 lend itself to sexual offending. Many sex offenders
2 actually do not have that diagnosis that lend them to future
3 sex offending.

4 I also looked at the actuarial instruments to
5 determine their risk of offense in the future. I then look
6 at whether there are any issues that would cause me to
7 adjust the actuarial assessment. You might have an
8 offender, for example, with a high risk of offending but
9 he's in extremely poor health, permanently in poor health
10 and thus the risk assessment should be adjusted.

11 And finally I look at the evidence of treatment and
12 the impact of treatment. And I also look at the issue of
13 volitional impairment. Is the person, does the person have
14 anything that affects their volition and makes it difficult
15 for them to control their impulses.

16 **Q.** And in connection with your work in this case did you
17 also review the reports submitted by Doctors Mills and
18 Plaud?

19 **A.** I did.

20 **Q.** Were you permitted to interview Mr. Graham?

21 **A.** I was not.

22 **Q.** How did that affect your ability to reach opinions in
23 this case?

24 **A.** It limits it in some ways. A missing piece in this case
25 in my opinion is that no one has done a psychopathy

1 checklist on Mr. Graham. The concept of psychopathy is
2 important to sexual offending, and important in this case in
3 a couple of ways. There is a lot of research to suggest
4 that sexual deviance combined with psychopathy results in
5 very fast and very high levels of recidivism.

6 And, secondly, aging tends to affect psychopaths
7 differently. They tend to decrease their nonviolent
8 offenses as they age but not their violent offenses, not
9 necessarily.

10 Q. Okay. Now, before we get to the opinions you formed in
11 this case, did you consider Mr. Graham's background?

12 A. Yes.

13 Q. Can you tell us about his youth and any early criminal
14 history?

15 A. He says that he had a normal background in terms of his
16 family. At age 13 he began -- he was arrested for
17 shoplifting. I believe he has said that he was sent
18 somewhere for a couple of months based on that. At age 15
19 he has a conviction for assault as well.

20 Q. Okay. And can you tell us what you know about his drug
21 use?

22 A. He began drug use at an early age. He admitted to using
23 marijuana from the age of 14. He was using heroin from the
24 age of 15.

25 **THE COURT:** Where did you get this history?

1 **THE WITNESS:** This history is in the reports. He
2 reported to the presentence evaluator that he consumed all
3 of this --

4 **THE COURT:** No, I mean, this entire history -- you
5 didn't interview him.

6 **THE WITNESS:** I did not interview him. This was
7 all based on records.

8 **THE COURT:** Okay.

9 BY MR. SAVERY

10 **Q.** And was Mr. Graham convicted of any sexual offenses?

11 **A.** Yes.

12 **Q.** When did the first offense occur?

13 **A.** The first offense occurred in 1974, in January.

14 **Q.** Okay. Did you rely on any records relating to this
15 offense?

16 **A.** Yes.

17 **Q.** If you'd turn to Exhibit 13, please. And specifically
18 to pages 408 and 409.

19 **A.** Yes.

20 **Q.** Do those concern this first offense?

21 **A.** Yes, it does.

22 **Q.** Okay. And focusing on 409 which I have put up here on
23 the camera (indicating), are you able to read the
24 description of the event from this page?

25 **A.** Yes. "Black female reports that at about 0215 hours,

1 1/24/74, she accepted a ride home from the Chung-King
2 Restaurant at 709 H Street, N.E. A man known to her as
3 'Wesley' drove her to the 5100 block of C Street, S.E. and
4 parked in a parking lot. He told her that he wasn't a
5 teenager and he was going to show her that he wasn't. He
6 told her to remove her clothes and she told him no. He
7 grabbed her pants and the seam tore in the crotch. He
8 removed her pants and her panties and had sexual intercourse
9 with her, reaching a climax and ejaculating on her and in
10 her. He let her out of the car and told her that he would
11 give her a ride to her boyfriend's. She told him to go to
12 hell. She went to her boyfriend's home and called her
13 cousin and then called the police. The complainant was
14 later examined at D.C. General Hospital and released."

15 Q. Okay. And can you continue with that last line, please.

16 A. "The defendant denies having intercourse with the
17 complainant."

18 Q. Do you know whether he still denies this offense?

19 A. Yes, I believe that he has maintained his stance that
20 this is a vindictive ex-girlfriend who reported him for rape
21 when he told her that he was marrying someone else.

22 Q. Okay. And was Mr. Graham convicted of this offense?

23 A. He was.

24 Q. I'd like you to turn to -- actually you don't even have
25 to turn. I'll put it up here on the ELMO.

1 **MR. SAVERY:** This is marked in the binder, this is
2 Exhibit D for identification but my understanding is that
3 it's now a stipulated exhibit and I'll offer it, Your Honor.

4 **THE COURT:** Any objection?

5 **MR. GOLD:** I'm sorry, Your Honor. That's correct.

6 **THE COURT:** Okay. I will let it in.

7 **MR. SAVERY:** So this will be Exhibit 29.

8 **(Government's Exhibit No. 29 received in evidence.)**

9 BY MR. SAVERY

10 **Q.** And what is this document, Dr. Salter?

11 **A.** This document is a certificate that states that he was
12 convicted of rape and sentenced to 6 to 18 months. It was
13 the second charge that was nolle prosequi.

14 **Q.** Okay. But the second charge was listed on this
15 document, case No. 19572 A 74 that shows a rape charge and a
16 disposition of 6 to 18 months?

17 **A.** Yes.

18 **Q.** And do you know, he was incarcerated; is that right?

19 **A.** He was incarcerated.

20 **Q.** And when was he released?

21 **A.** He was released on parole in January of 1976. After
22 five and a half months of the sentence.

23 **Q.** Following his release when did his next sexual offense
24 occur?

25 **A.** There is something wrong with this because it says that

1 it occurred in July 1975. It says he was released on parole
2 in January of 1976 so let me go back to my report for that.

3 **Q.** Sure.

4 **A.** And the second one, the date --

5 **MR. GOLD:** Your Honor, it's not clear to us at
6 least what the witness is looking at. If she could identify
7 that.

8 **THE WITNESS:** I have a --

9 **THE COURT:** I thought the question dealt with a
10 record.

11 **MR. SAVERY:** Initially, Your Honor, the question
12 dealt with the prior record. I'm asking now when he was
13 released from this first incarceration.

14 **THE COURT:** And she is referring to records to give
15 us an answer; right?

16 **MR. SAVERY:** Yes. Yes, she is. Well, she is
17 now --

18 **THE COURT:** She seems to have trouble with the
19 record, the accuracy of the record.

20 **THE WITNESS:** I have an offense that appears that I
21 have a question about. I am going back to my report which
22 specifies that he was released after five and a half months
23 and put on parole.

24 His next offense was June, let's see, his next
25 offense was July 2nd, 1975, so a few months after, I think

1 about six months after he was released.

2 **MR. SAVERY:** And if I could clarify this, Your
3 Honor.

4 BY MR. SAVERY

5 **Q.** Were you referring to a chronology when you noted that
6 there is an inconsistency in dates?

7 **A.** Yes.

8 **MR. SAVERY:** And, Your Honor, I'll represent to the
9 Court that this is a chronology that the government has
10 prepared and that is going in by stipulation, although the
11 defense wants an opportunity to review it again. We've
12 communicated back and forth on this over the last few days.
13 But it does appear that there is an incorrect date in his
14 chronology. And I'm happy to replace it with an accurate
15 chronology, you know, if that's the appropriate course.

16 In all events the defense --

17 **THE COURT:** Well, why don't you see if you can
18 agree on a course of action. If you can't, then bring it to
19 my attention and I will try to solve the problem. Okay.

20 **MR. SAVERY:** Okay. Thank you, Your Honor.

21 BY MR. SAVERY

22 **Q.** So, Dr. Salter, can you reiterate for us when it was
23 that he was released from prison for his first, on his first
24 offense?

25 **A.** I believe he was released in January of '75 and

1 reoffended in July of '75.

2 Q. Okay. And he was released on parole?

3 A. Yes.

4 Q. Okay. And how long after that release then was he next
5 arrested for a sexual offense?

6 A. July.

7 Q. Six months?

8 A. Yes.

9 Q. Okay.

10 A. July 2nd of '75 he committed his second offense.

11 Q. And was he still on parole at that time?

12 A. He was.

13 Q. And what was the second offense?

14 A. A pregnant woman was walking on a towpath near a place
15 called Fletcher's Boathouse. She was a stranger and was
16 assaulted by Mr. Graham. I cannot find any records that
17 give the details of this offense so all we know is that she
18 called the police and reported being assaulted and described
19 his clothes in great detail. And he was arrested on,
20 essentially near that place and convicted of assault with
21 intent to commit rape.

22 Q. Okay. If you could quickly turn to Exhibit 13.

23 Specifically to page 410 of that exhibit.

24 A. Okay.

25 Q. Going into 411.

1 **A.** Yes.

2 **Q.** Is that a United States Park Police Report?

3 **A.** Yes.

4 **Q.** And does that concern this offense?

5 **A.** Yes.

6 **Q.** Did you rely on that report?

7 **A.** Yes.

8 **Q.** If you would turn to the next exhibit, please, Exhibit
9 14, are those documents that relate to this offense as well?

10 **A.** Yes.

11 **Q.** Okay. And did you rely on them?

12 **A.** Yes.

13 **Q.** And if you would now turn to Exhibit 17 which
14 unfortunately is in your second binder.

15 If you'd turn to page 807.

16 **A.** Yes.

17 **Q.** What's that document?

18 **A.** A Presentence Report.

19 **Q.** Okay. Could you turn to page 808, please. I'm going to
20 put an image of this up on the overhead.

21 **A.** Okay.

22 **Q.** If you could read the first two sentences in this page.

23 **A.** "The defendant Wesley Graham was originally charged in a
24 grand jury indictment with assault with intent to rape."

25 **Q.** Could you read the next sentence, please.

1 **A.** "On March 23, 1976 the defendant entered a plea of
2 guilty to assault with intent to rape."

3 **Q.** And finally could you read the paragraph beginning with
4 "according to."

5 **A.** "According to the statement of facts submitted by the
6 Metropolitan Police Department, at approximately 1534 hours,
7 a police officer was informed by the dispatcher of an
8 assault that had occurred on the C&O Canal towpath,
9 one-quarter mile east of Fletcher's Boat House. A
10 description was issued as follows: 'A negro/male, five ten
11 to five eleven, 180 pounds, white T shirt worn about the
12 head, bluejeans with light-colored stitches down the sides
13 of his pants and black criss-cross sandals.' At
14 approximately 1613 hours a search was made of the M and
15 Grace Streets area where an individual fitting the
16 description was observed. The individual was approached as
17 he was attempting to enter a Lincoln with D.C. registration
18 316-764 in the vicinity of Potomac and Gray Street, N.W."

19 **Q.** Okay. Thank you.

20 Could you flip forward three pages, please, to page
21 811.

22 **A.** Okay.

23 **Q.** And down the bottom do you see an "Evaluative Summary"?

24 **A.** Yes.

25 **Q.** Could you read the second paragraph of that, please.

1 **A.** "The complainant, an eight-months pregnant woman, has
2 presented this writer with a detailed description of the
3 alleged attack on her by the defendant. As noted before,
4 this statement is attached to this report."

5 **Q.** Okay. Now, have you ever seen this victim statement?

6 **A.** No, I could not find it in any other records.

7 **Q.** Thank you.

8 Now, was Mr. Graham convicted of assault with
9 intent to rape?

10 **A.** He was.

11 **Q.** Could you turn quickly to Exhibit 14, please, page 415.

12 And is that a copy of the judgment and commitment
13 order for that charge of assault with intent to commit rape?

14 **A.** Yes.

15 **Q.** Okay. And what was his sentence?

16 **A.** His sentence at the time was 4 to 12 years
17 incarceration.

18 **Q.** Okay. Now, during this incarceration was psychotherapy
19 recommended for Mr. Graham?

20 **A.** Yes.

21 **Q.** And did that include to your knowledge some sort of sex
22 offender treatment?

23 **A.** I don't think there are any details about what it
24 included. I am not sure there was sex offender treatment at
25 that time.

1 **Q.** Okay. Did Mr. Graham attend psychotherapy?

2 **A.** I believe he attended for a period of time but did not
3 make progress and eventually he and the program agreed to
4 terminate.

5 **Q.** Okay. And how much of his 4- to 12-year sentence did
6 Mr. Graham serve?

7 **A.** He was released in 1982 which was six years later.

8 **Q.** And what was the nature of his release at that time?

9 **A.** He was placed on parole.

10 **Q.** Now, following his release was Mr. Graham convicted of
11 any crimes?

12 **A.** Yes.

13 **Q.** Can you explain that?

14 **A.** In May of 1985 he was found guilty of operating under
15 the influence and on December 5th of 1985 he was convicted
16 of one count of battery arising out of a June '85 incident
17 with his then girlfriend and her two daughters.

18 **Q.** Okay. Now --

19 **A.** There was actually several incidents involved in that,
20 however.

21 **Q.** Okay. Have you seen arrest records associated with that
22 series of incidents?

23 **A.** Yes.

24 **Q.** That is, the battery charge for which he was ultimately
25 convicted in late 1985?

1 **A.** Yes.

2 **Q.** And did you rely on information from those records in
3 reaching your opinions in this case?

4 **A.** Yes.

5 **Q.** And are they the type of records and do they contain the
6 type of information which an expert psychologist would use
7 in rendering a diagnosis and in reaching an opinion as to
8 sexual dangerousness?

9 **A.** Yes.

10 **Q.** If you could turn to Exhibit A for identification.

11 That is at the end of the second binder.

12 And if you could flip through that exhibit. Are
13 these the documents you were referring to?

14 **A.** Yes.

15 **Q.** Okay. I'd like to turn your attention to page 892.

16 **THE COURT:** Excuse me just one second.

17 **MR. SAVERY:** Sure.

18 (Pause in proceedings.)

19 **THE COURT:** Go ahead.

20 **MR. GOLD:** Your Honor, we are going to object to
21 the introduction of these records. These records were the
22 subject of a motion we filed in limine. The police reports
23 pertained to offenses which did not --

24 **THE COURT:** Did I rule on the motion in limine? I
25 don't remember.

1 **MR. GOLD:** As far as I am aware you have not.

2 **MR. SINNIS:** You without prejudice denied it.

3 **MR. GOLD:** Oh, denied without prejudice to us
4 renewing it at this moment.

5 **THE COURT:** At this moment, okay. And your
6 objection is what?

7 **MR. GOLD:** That the police reports here are
8 unreliable hearsay essentially. They are not validated by
9 conviction or any other indicia that would lend them any
10 reliability.

11 **THE COURT:** What do you say?

12 **MR. SAVERY:** Well, I say with respect to one of the
13 reports, Your Honor, there was a conviction that resulted.

14 With respect to the other, to the extent the expert
15 relied on these, you know, they can come in. We don't have
16 a jury here so Rule 703 wouldn't prevent them from being
17 disclosed to the court.

18 Frankly, Your Honor is in a position to determine
19 how much weight to give any of the evidence that comes in in
20 this proceeding.

21 **THE COURT:** I am going to sustain the objection
22 though. Let's have the record clear. So I will sustain the
23 objection. I will allow the motion in limine.

24 **MR. GOLD:** Thank you, Your Honor.

25 **MR. SAVERY:** Your Honor, to the extent she's

1 relying on this, may she testify --

2 **THE COURT:** Oh, yes.

3 **MR. SAVERY:** -- without the records coming in?

4 **THE COURT:** She can rely on all kinds of material
5 that is not evidence in the case. As long as she testifies
6 that it is the type of information that experts reasonably
7 rely on.

8 **MR. SAVERY:** Okay. Just so I'm clear, the
9 objection has been sustained as to these documents coming in
10 as evidence?

11 **THE COURT:** As evidence. She can use them as part
12 of her opinion. If I let them come in as evidence, whatever
13 they say is then evidence in the case for all purposes and
14 that is not what I want.

15 **MR. SAVERY:** Okay.

16 **THE COURT:** Why don't you go ahead and just ask
17 questions and let's see if you make it where you want to
18 get.

19 **MR. SAVERY:** Okay. Sounds good.

20 BY MR. SAVERY

21 **Q.** If you'd turn, please, to page 893 rather than 892.

22 **MR. GOLD:** Your Honor, our objection -- the witness
23 may testify as to her opinion and records that she reviewed;
24 but we would object to the display of this information that
25 is not coming into evidence to the witness in this fashion.

1 She could --

2 **THE COURT:** I mean, she has already looked at this
3 material I take it and it is part of her opinion. I don't
4 understand what you are saying.

5 **MR. GOLD:** Well, that it's -- my concern I suppose
6 is coming from the concern that this is material that is not
7 going to be in front of the trier of fact and here it is
8 being displayed to the trier of fact during the course of
9 the witness's testimony.

10 **THE COURT:** Well, in a jury-waived trial, you know,
11 no matter what happens, the trier of fact has to see the
12 document if for no other reason than to agree with you that
13 it should be sustained. But the trier of fact always sees
14 the document unless you can figure out a way that I can do
15 it without seeing it.

16 **MR. GOLD:** Well, I am going to sit down.

17 (Laughter.)

18 **THE COURT:** Okay.

19 BY MR. SAVERY

20 **Q.** Dr. Salter, does this first document concern a charge
21 No. 610063E6?

22 **A.** Yes.

23 **Q.** Okay. And do the following two pages concern that same
24 charge number?

25 **A.** Yes.

1 **Q.** And can you tell us briefly what this charge concerned?

2 **A.** This is a description or a charge of assault by the
3 daughter of the woman that Mr. Graham was living with. She
4 describes being at the residence of her mother when
5 Mr. Graham tried to hit her mother. She got in between them
6 to prevent her mother from being assaulted. He grabbed the
7 daughter and started choking her. And he dragged her from
8 the kitchen into the living room, pinned her down and began
9 to choke her again. Her four-year old was witnessing this
10 assault and she managed to free herself and leave the
11 apartment.

12 **Q.** And is this a description of events that you relied on
13 in your analysis of this case?

14 **A.** Yes, arrest records are commonly relied on by experts.

15 **Q.** Thank you. I'd like you to turn to, flip forward three
16 more pages.

17 And does this next report concern a charge numbered
18 610064EO?

19 **A.** Yes.

20 **Q.** And, again, if you'd flip through the next few pages, do
21 those documents as well concern that same charge?

22 **A.** Yes.

23 **Q.** Can you tell us what this charge concerned?

24 **A.** This is another assault on a daughter. She describes
25 that she was home taking care of her mother who had recently

1 had a hysterectomy and was confined to bed.

2 **THE COURT:** Different charges, different day, a
3 different event?

4 **THE WITNESS:** Yes, that's correct.

5 **THE COURT:** Okay.

6 **THE WITNESS:** Different event.

7 Okay. She -- Mr. Graham came in from work and
8 started shouting at her mother and pushing her, cursing her
9 mother and pushing her. It's really hard to read the next
10 word, conservatively I think it says, he locked her in the
11 bedroom. She went nextdoor and called the police twice but
12 each time Mr. Graham was able to give the appearance that
13 nothing was wrong and nothing was happening so the police
14 did not remove him. Immediately after the police left he
15 was very angry because she had called the police. He
16 started cursing her mother, pushing her and pushing her. He
17 started calling the daughter a bitch, mother fucker and
18 various other profane words. He told me if I didn't leave
19 the house, he would kill me. And then he punched her
20 against the door. He then said that he would knock all my
21 teeth down my throat if I didn't leave.

22 So she became very fearful and left.

23 **Q.** Okay. If you flip forward two pages, Dr. Salter, page
24 900, is that an arrest warrant?

25 **A.** Yes.

1 **Q.** And what is the date on that arrest warrant as best you
2 can tell?

3 **A.** The arrest warrant is 6/19/85, that is, June of '85.

4 **Q.** Okay. So it was June of '85 that he was arrested on
5 this charge?

6 **A.** Yes.

7 **Q.** Now, was he arrested on all three of the charges on that
8 same date?

9 **A.** I believe he was arrested on that date but it didn't all
10 occur on that date.

11 **Q.** Okay. So let's step back for just a minute. The charge
12 that you just discussed which is addressed on pages 897, 898
13 and 899, when was that conduct allegedly carried out?

14 **A.** May 17th, about a month earlier.

15 **Q.** Of 1985?

16 **A.** Of 1985.

17 **Q.** Okay. And if you can flip back for just a minute to the
18 first charge you addressed, did this first charge involve
19 the choking of one of the adult daughters according to the
20 documents?

21 **A.** Yes.

22 **Q.** Okay. And when did that occur according to these
23 documents?

24 **A.** I remember it as being August but I am looking for the
25 exact date here.

1 **Q.** If you look at page 894.

2 **A.** Right. August, that's right.

3 **Q.** And that's August of 1984?

4 **A.** That's right.

5 **Q.** Okay. So that's ten months before the charge was
6 actually brought; right?

7 **A.** That's right.

8 **Q.** Okay. So the first one we've got now alleged conduct
9 ten months before the charge is brought; right?

10 **A.** Right.

11 **Q.** The second one we've got the conduct occurring in May of
12 '85 which is a few weeks before his arrest?

13 **A.** Yes.

14 **Q.** Now, let's turn to the third one. And if you'd turn to
15 page 902. Does page 902 concern a charge No. 610062E5?

16 **A.** Yes.

17 **Q.** Okay. And do the next several pages relate to that
18 charge as well?

19 **A.** Yes.

20 **Q.** Now, when did this event allegedly take place, or the
21 events that these documents concern, when did they take
22 place? According to the document?

23 **A.** I remember it was in June, 6/14, 6/14/85.

24 **Q.** So June 14 of 1985; right?

25 **A.** Yes.

1 **Q.** And when was the arrest warrant issued? Did you say it
2 was June 19th?

3 **A.** I believe it was the 18th or the 19th. Let's see
4 exactly.

5 **Q.** It looks like 18 on page 905.

6 **A.** It says 18, 19. I don't know what that means.

7 **Q.** Okay. In any event, somewhere three or four days prior
8 to the arrest is when this alleged incident took place; is
9 that right?

10 **A.** Yes.

11 **Q.** Okay. Can you tell us briefly what this incident
12 involved?

13 **A.** This incident has to do with his, first of
14 all, taking his girlfriend's car and then telling her that
15 it was stolen. There was a dispute about the car. And then
16 he assaulted the girlfriend. And specifically what she says
17 was, He took the vehicle without authority, therefore
18 leaving the owner without transportation. She called him at
19 work. Let's see.

20 On Friday the defendant reported the victim's
21 vehicle stolen to the District Police. However, all the
22 information given was incorrect. She thought someone else
23 stole it. The owner told the police that the defendant had
24 stolen her car but the defendant fabricated another story.
25 After the owner and defendant were back at the owner's

1 address, the police were called to verify information
2 concerning his name and address. And while the owner was
3 speaking, the defendant slapped her and hung up the phone.
4 He then called the police back and said the phone went dead.
5 On Saturday morning the defendant assaulted her again,
6 slapping and kicking her on the bed and forced her to have
7 sexual relations even though she had been given instructions
8 due to medical surgery by her doctor not to have relations
9 for two to three months. She told him this. However, he
10 told her that if she did not comply, she would be sorry. He
11 pushed her again.

12 **Q.** Okay. Thank you.

13 Now, if you'd turn to page 889, have you seen this
14 document before?

15 **A.** Yes.

16 **Q.** And is this a memorandum issued in the Department of
17 Corrections?

18 **A.** Yes.

19 **Q.** Does this concern the three battery charges?

20 **A.** Yes.

21 **Q.** And I'd like to turn your attention to the second page,
22 that's page 890. And specifically to the paragraph down at
23 the bottom that begins, "Immediately upon his release."

24 **A.** Yes.

25 **Q.** Okay. Can you read that for us?

1 **A.** "Immediately upon his release, he reported to this
2 writer, he states there have been times when he and Mrs. P.
3 have argued but denies the severity of her allegations
4 against him. It should be noted that the alleged incident
5 took place approximately ten months ago. It would appear
6 she is reacting to the loss of her automobile and is
7 distressed over his admitted involvement with other women."

8 **Q.** Okay. When was the loss of the automobile in proximity
9 to the date of arrest?

10 **A.** The loss of the automobile I believe was in, it was a
11 few days earlier in June.

12 **Q.** A few days prior?

13 **A.** Yes.

14 **Q.** So when this refers to an incident taking place ten
15 months ago --

16 **A.** Right.

17 **Q.** -- is this correct insofar as it refers to the
18 battery --

19 **MR. GOLD:** Objection, Your Honor.

20 **A.** -- on Mary P.?

21 **MR. GOLD:** The documents --

22 **THE COURT:** Yes, I will sustain the objection.

23 **MR. SAVERY:** Okay.

24 BY MR. SAVERY

25 **Q.** In any event, the first battery that you addressed

1 occurred ten months prior; is that right?

2 **A.** Yes.

3 **Q.** The second battery occurred three, four weeks prior?

4 **A.** Yes.

5 **MR. GOLD:** Objection, Your Honor.

6 **THE COURT:** I will let him do it. Go ahead.

7 BY MR. SAVERY

8 **Q.** And the battery involving Mrs. P. and the force of sex,
9 that occurred several days before the arrest?

10 **A.** It occurred several days before the arrest, yes.

11 **Q.** Thank you.

12 Now, was Mr. Graham convicted of any of these three
13 battery charges?

14 **A.** He was convicted of one of these assaults.

15 **Q.** Okay. I'd like you to turn to Exhibit 18, please.

16 And do you recognize these as documents you
17 reviewed in the course of your work in this case?

18 **A.** Yes.

19 **Q.** Are they certified records of the District Court of
20 Maryland?

21 **A.** Yes.

22 **Q.** Do they concern the three battery charges that we've
23 discussed?

24 **A.** Yes.

25 **Q.** And what did they tell us regarding the disposition of

1 those battery charges?

2 You can start with page 941.

3 **A.** On 941 it says is that one battery was NP, nolle
4 prossed.

5 **Q.** Okay. And is that referring to case No. 610062E5?

6 **A.** Yes.

7 **Q.** Okay. If you'd turn to page 944. Does that concern
8 case No. 610036E6?

9 **A.** Yes.

10 **Q.** And what was the disposition in that case?

11 **A.** Nolle prossed.

12 **Q.** Finally, page 946, does that concern charge
13 No. 610064E0?

14 **A.** Yes.

15 **Q.** And what is the disposition noted?

16 **A.** Guilty.

17 **Q.** And is it your understanding that -- well, strike that.

18 Which charge do you understand the guilty
19 disposition to relate to?

20 **A.** I believe it was the choking.

21 **Q.** Of one of the children?

22 **A.** The choking.

23 **Q.** The choking?

24 **A.** That's what I believe.

25 **Q.** Now, are you aware of any drug testing conducted of

1 Mr. Graham while he was out on parole?

2 **A.** Yes, he was drug tested. He flunked at least I believe
3 two.

4 **Q.** And what were those two drug tests positive for?

5 **A.** Marijuana and PCP on two different occasions.

6 **Q.** Okay. Now, how old was Mr. Graham at this point?

7 **A.** Let my amend my answer. He apparently had flunked three
8 times, one on 1/17/86 and one on 3/7/86. Both of those were
9 for marijuana and one in April for PCP.

10 **Q.** Okay. And all these occurred in early 1986?

11 **A.** Yes.

12 **Q.** Okay. And how old was Mr. Graham at the time?

13 **A.** 36.

14 **THE COURT:** Okay. Let's take a five-minute break.

15 Okay.

16 **MR. SAVERY:** Sure, Your Honor. Thank you.

17 (Recess.)

18 **THE CLERK:** All rise for the Honorable Court.

19 (Pause in proceedings.)

20 **THE COURT:** Take your time. No rush.

21 **MR. SINNIS:** Sorry, Your Honor.

22 **THE COURT:** That is all right.

23 Everybody back?

24 **MR. SAVERY:** I believe so.

25 **THE COURT:** Okay. We will employ the buddy system,

1 the person -- remember when you were in camp?

2 (Laughter.)

3 **THE COURT:** All right. Sit down, everybody.

4 Go ahead.

5 **MR. SAVERY:** Thank you, Your Honor.

6 **ANNA CAROL SALTER, Resumed**

7 **DIRECT EXAMINATION, (Cont'd.)**

8 BY MR. SAVERY

9 **Q.** Now, after Mr. Graham tested positive for marijuana and
10 PCP, at some point did he stop reporting to his probation
11 officer?

12 **A.** Yes, he did.

13 **THE COURT:** Did he stop or start?

14 **MR. SAVERY:** Stop.

15 **THE COURT:** Stop.

16 **A.** He stopped.

17 **Q.** Okay. Can you tell us about that?

18 **A.** He quit contacting his probation officer.

19 **Q.** Okay. And do you recall when that was?

20 **A.** I don't have it in front of me. I believe it's --

21 **Q.** Okay.

22 **MR. SINNIS:** Can I just ask the witness to keep her
23 voice up. I'm having a little difficulty --

24 **THE WITNESS:** I'm sorry.

25 **THE COURT:** You know, I was going to ask her too.

1 Just try to speak a little louder, please.

2 **THE WITNESS:** Yes.

3 BY MR. SAVERY

4 **Q.** Would you turn to Exhibit 17, page 818.

5 I'm going to put this up on the screen. So if
6 you'd turn now to page 819. In fact, you can look up on the
7 screen for it.

8 First off, do you recognize this document as one
9 that you reviewed?

10 **A.** Yes, I do.

11 **Q.** And does this contain a recommendation of a case
12 analyst?

13 **A.** Yes.

14 **Q.** And if you refer down to the bottom of the page, do you
15 see a paragraph beginning, "Subject failed to maintain"?

16 **A.** Yes.

17 **Q.** Can you read that, please?

18 **A.** "Subject failed to maintain contact with his supervision
19 officer shortly after being advised that the parole
20 violation warrant had been issued by the D.C. Parole Board.
21 Subject's last contact with his officer was on 6/2/86.
22 There was no additional contact made between 6/2/86 and his
23 arrest on 5/27/87."

24 **Q.** Okay.

25 **THE COURT:** This is the Parole Board document; is

1 that what it is?

2 **MR. SAVERY:** It is, Your Honor.

3 **THE COURT:** Okay.

4 BY MR. SAVERY

5 **Q.** Now, at some point did Mr. Graham commit another sexual
6 offense?

7 **A.** He did.

8 **Q.** And when did that occur?

9 **A.** It occurred in 1987 on 5/24.

10 **Q.** Okay. I'll ask you to turn to Exhibit 16 at page 512.

11 Is this a court record that you relied on?

12 **A.** Yes.

13 **Q.** If you'd turn to the next page, I'm going to put this up
14 on the projector but it's difficult to read.

15 I'll ask you to do your best and read through the
16 fact section.

17 **A.** "The victim testified that on May 24, 1987 at eight a.m.
18 she had been working in her garden adjacent to her residence
19 for over an hour when appellant approached her from the
20 sidewalk. Appellant stepped onto the victim's patio and
21 engaged her in a brief neighborly type conversation. The
22 victim brought the conversation to a close and went inside
23 her residence and closed the screen door. It could not be
24 locked. The victim saw that appellant had left the patio
25 and had returned to the picnic area nearby. While the

1 victim was listening to the audio of a videotape, appellant
2 again appeared at the screen door and presented her with a
3 plant. She thanked him and again said that she had to go
4 inside. At approximately 11 a.m. the victim saw the
5 appellant again standing at her screen door with his right
6 hand gloved and his left hand pressed against the glass. It
7 was then that she became apprehensive. Despite the victim's
8 protest, appellant pushed his way into her condominium,
9 asserting that he wanted to see the plant he had given her.
10 When the victim screamed, appellant placed his gloved hand
11 over her throat and grabbed her into the living room.
12 Although the victim initially struggled to free herself, she
13 stopped when appellant threatened to kill her. Appellant
14 then choked the victim until she passed out telling her, 'I
15 have just got to put you out for a while.' When the victim
16 regained consciousness and attempted to stand, appellant
17 choked her again. The victim twisted her body so that she
18 could kick the door. She stopped when appellant again
19 threatened to kill her. For the second time the appellant
20 choked the victim into unconsciousness. Before the
21 appellant initiated sexual intercourse with her, the victim
22 requested that he be gentle because she had not had
23 intercourse for about four months. After the act was
24 completed, the appellant warned the victim that no one would
25 believe her if she reported because --" I'm sorry.

1 **Q.** Okay. Does it appear, "There was no sign of forced
2 entry"?

3 **A.** Yes, "Because there was no sign of forced entry. Then
4 victim requested a glass of tea and appellant helped her up
5 because she was too weak to stand.

6 "At approximately 11:30 a.m. appellant outstretched
7 his hand to guide the victim to a bedroom, stated that he
8 wanted to make love to her in her bed. The second act of
9 intercourse occurred in the bedroom. Afterwards there was
10 some conversation wherein the appellant requested the
11 victim's telephone number which she gave to him. The victim
12 thanked him for not killing her.

13 **Q.** Okay. Thank you.

14 And just for purposes of the record here, at page
15 512, I am showing you now what's been numbered page 512.
16 And that was the first page of this document; is that right?

17 **A.** Yes, it was.

18 **Q.** And is that an Unreported Decision of the Special
19 Appeals of Maryland?

20 **A.** Yes.

21 **Q.** Thank you.

22 Now, if you'd turn to Exhibit 17. I'm sorry we're
23 jumping around a little bit here. At page 793.

24 Could you tell us what that document is?

25 **A.** That document is a Presentence Investigation.

1 **Q.** Okay. Does that contain at page 793 a description of
2 the events relating to this offense?

3 **A.** Yes.

4 **Q.** And did you -- the prior description of events, is that
5 something you relied on in this case?

6 **A.** Yes.

7 **Q.** The one that you read into the record?

8 **A.** Yes.

9 **Q.** Is this as well?

10 **A.** Yes.

11 **Q.** Okay. And if you'd turn to the same exhibit, page 800.
12 Does that likewise contain additional information concerning
13 the events here?

14 **A.** Yes.

15 **Q.** And did you rely on that as well?

16 **A.** Yes.

17 **Q.** How many times does it say she was strangled in this
18 description?

19 **A.** Three times.

20 **Q.** And, again, if you'd turn to Page 869 to 870, is this
21 yet another document on which you relied that relates some
22 of the facts associated with this incident?

23 **A.** Yes.

24 **Q.** Now, at the time of this offense how old was Mr. Graham?

25 **A.** Mr. Graham was 37.

1 Q. And was Mr. Graham on parole?

2 A. I believe he was, yes.

3 Q. Was he on parole at the time?

4 A. Yes.

5 Q. And was Mr. Graham prosecuted for this offense?

6 A. Yes, he was.

7 Q. If you'd turn to Exhibit 16. Actually I'll put this up
8 on the overhead. This is at Page 577 of Exhibit 16.

9 And is this one of the court records that you
10 reviewed in connection with your work in this case?

11 A. Yes.

12 Q. Is it one of the records you relied on?

13 A. Yes.

14 Q. And does this address the verdict --

15 A. Yes.

16 Q. -- and the prosecution?

17 And was he found guilty?

18 A. He was found guilty.

19 Q. And what was the sentence that was imposed?

20 A. He was sentenced to 25 years on one count, I believe 25
21 years on another concurrent and 5 years but that was merged
22 with one of the other counts.

23 Q. Okay. And was Mr. Graham thereafter incarcerated?

24 A. He was.

25 Q. And how much of his 25-year sentence did he serve out?

1 **A.** Let's see, I think it was 2003 so it was from 1986 to
2 2003, so that would be fifteen.

3 **Q.** Is that 16, 17 years, that range?

4 **A.** 17 years actually.

5 **Q.** And what happened then?

6 **A.** Well, he was detained by the Federal Parole Commission
7 because he, his parole had been revoked for the previous
8 sexual assault.

9 **Q.** Okay. And I am referring now to page 825 of Exhibit 17.
10 Is this a document that you reviewed?

11 **A.** Yes.

12 **Q.** Is it a Parole Commission Notice of Action?

13 **A.** Yes.

14 **Q.** Dated May 6, 2004?

15 **A.** Yes.

16 **Q.** Can you read for us the findings of fact.

17 **A.** "The Commission finds as a fact that you violated
18 conditions of release as charged as indicated below: Charge
19 No. one, law violation, rape. Basis for the above stated
20 findings: Your admission and your conviction in Maryland in
21 1987."

22 **Q.** Okay. And if we go down to the "Reasons" section on
23 this report. Could you read to us the text beginning,
24 "After review --"

25 **A.** "After review of all relevant factors and information, a

1 decision above the guidelines is warranted because you are a
2 more serious risk than indicated by your salient factor
3 score in that the current parole violation includes a
4 conviction for rape. This is the third time you have been
5 convicted of rape or attempted rape and two of these
6 occurred while under supervision. You remain a serious risk
7 to commit further sex offenses once released again to the
8 community."

9 Q. Okay. Has Mr. Graham participated in sex offender
10 treatment since being incarcerated for his last offense?

11 A. Not to my knowledge, no.

12 Q. I'd like you to turn to Exhibit 7, please. Is that a
13 document that you reviewed in this case?

14 A. Yes.

15 Q. And you considered it in connection with your assessment
16 in this case?

17 A. Yes.

18 Q. Can you describe this document?

19 A. This is a Federal Bureau of Prisons Psychology Data
20 System.

21 Q. Is this dated 6/13/06?

22 A. Yes, it is.

23 Q. Can you read the body of the document beginning with, "I
24 have reviewed this inmate's."

25 A. "I have reviewed this inmate's psychology file and

1 SENTRY files. He was recommended for both drug treatment
2 and sex offender treatment but has declined participation in
3 both. He has a history of heroin and cannabis dependence,
4 and tested positive for PCP in the year he was convicted of
5 his third rape. The likelihood of reoffense without a
6 willingness to rehab on his part is very high. I am
7 recommending that the unit team meet with him and recommend
8 him for the drug education program and NA," Narcotics
9 Anonymous I would assume, "on Fridays. If he successfully
10 completes drug education, I would recommend him for a
11 shorter period of CCC (one month) provided he agrees to
12 attend substance treatment while in CCC."

13 **Q.** Okay.

14 **THE COURT:** What is CCC?

15 **THE WITNESS:** I don't know.

16 BY MR. SAVERY

17 **Q.** Are you aware whether Mr. Graham participated in
18 any drug program?

19 **A.** I did not.

20 **THE COURT:** Did you read the report before you
21 testified today?

22 **THE WITNESS:** Yes, sir.

23 **THE COURT:** And when you came across CCC, reading
24 it, did it --

25 **THE WITNESS:** Well, the important thing about the

1 report to me --

2 **THE COURT:** No, you can listen to my question.

3 **THE WITNESS:** I'm sorry.

4 **THE COURT:** Did you consider it important to know
5 what CCC meant?

6 **THE WITNESS:** No, sir.

7 **THE COURT:** Okay.

8 BY MR. SAVERY

9 **Q.** Are you familiar with community correction programs?

10 **A.** Yes.

11 **Q.** And what are those?

12 **A.** Well, those are typically some kind of aftercare program
13 and they differ from place to place but they have the same
14 general structure. The important point was he was offered a
15 chance to have a shorter aftercare period in exchange for
16 treatment and he declined.

17 **Q.** Now, is it your understanding that Mr. Graham was due to
18 be released at the time these proceedings began --

19 **A.** Yes.

20 **Q.** -- in this case?

21 Would there have been any conditions on his release
22 to your knowledge?

23 **A.** To my knowledge, no.

24 **Q.** Prior to his release date was he evaluated by a staff
25 psychologist with the Bureau of Prisons?

1 **A.** He was.

2 **Q.** And who was that?

3 **A.** I'd have to look at the name, Monica.

4 **Q.** Okay. If you can turn to Exhibit 5.

5 **A.** The certification was done by Monica Ferraro.

6 **Q.** And is it your understanding that Dr. Ferraro
7 interviewed Mr. Graham?

8 **A.** Yes.

9 **Q.** And did she record his comments and conclusions in her
10 report?

11 **A.** Yes.

12 **Q.** And did you rely on the contents of this report in
13 connection with your work in this case?

14 **A.** Yes.

15 **Q.** And what does Dr. Ferraro conclude in terms of
16 Mr. Graham's risk of reoffense?

17 **A.** She concluded high risk.

18 **Q.** Okay. I'd like to turn now, Dr. Salter, to your own
19 opinions. And based on your education and experience and
20 your review of the materials provided to you, have you
21 reached an opinion to a reasonable degree of professional
22 certainty as to whether Mr. Graham engaged or attempted to
23 engage in sexually violent conduct?

24 **A.** Yes.

25 **Q.** What is your opinion?

1 **A.** The record is clear that he's been convicted of three
2 rapes or two rapes and assault with the intent to commit
3 rape.

4 **Q.** Okay. And have you reached an opinion to a reasonable
5 degree of professional certainty that Mr. Graham suffers
6 from a serious mental illness, abnormality or disorder?

7 **A.** Yes.

8 **Q.** And what is your opinion?

9 **A.** He does.

10 **Q.** And which mental illness, abnormality or disorder is he
11 suffering from?

12 **A.** Paraphilia NOS and Antisocial Personality Disorder.

13 **Q.** Could you please turn to Exhibit 20.

14 What does Exhibit 20 contain?

15 **A.** It's the *Diagnostic and Statistical*, a section from the
16 *Diagnostic and Statistical Manual of Mental Disorders*,
17 *Fourth Edition, Text Revision, DSM-IV-TR*.

18 **Q.** And what is the DSM-IV-TR?

19 **A.** The DSM-IV-TR4 is the latest edition of the *Diagnostic*
20 *and Statistical Manual* published by the American Psychiatric
21 Association. It is the only classification system that is
22 used to assess diagnoses in this country. And it's accepted
23 everywhere in terms of hospitals, court systems, mental
24 health facilities and insurance agencies. To my knowledge
25 there is no other system that is currently in use in this

1 country.

2 Q. Okay. Let's turn to Antisocial Personality Disorder.

3 What is Antisocial Personality Disorder?

4 A. It's a pervasive pattern for and violation of the rights
5 of others. It also has personality features associated with
6 it.

7 Q. Okay. And did you apply criteria from the DSM for
8 Antisocial Personality Disorder?

9 A. I did. The way diagnoses works is that for many of them
10 they list specific criteria and they even list how many of
11 these criteria that you have to have to make the diagnosis.

12 Q. Okay. And are those criteria identified on page 706 of
13 Exhibit 20?

14 A. They are.

15 Q. Okay. And I have an image of that up on the screen.

16 Can you explain with reference to these criteria
17 why you determined that Mr. Graham should be diagnosed with
18 Antisocial Personality Disorder?

19 A. I went down the criteria one by one and I looked at his
20 history and answered the question of whether or not he had
21 each of these criteria. For example, in Section A you would
22 have to have, to meet this diagnosis you need to have three
23 or more of the following.

24 The first one is, "Failure to conform to social
25 norms with respect to lawful behaviors as indicated by

1 repeatedly performing acts that are grounds for arrest."

2 I don't think there is any question about whether
3 Mr. Graham has repeatedly been arrested. He has three
4 rapes, two rapes and one attempt, assault with attempt to
5 commit rape, three OUIs and a battery among others on his
6 record. So he clearly meets that criteria.

7 Criteria two is deceitfulness as evidenced by
8 repeated lying, use of aliases or conning others for
9 personal profit or pleasure.

10 Now, we don't have records, at least I don't, about
11 much of his personal life. What we do have are the official
12 records of his offenses. And we see that deceit was very
13 much a part of his offenses. He offered one young woman a
14 ride home but instead of taking her home, he took her to a
15 remote location and raped her.

16 He chatted up with a stranger victim. Then brought
17 her a plant and attempted entry into her house claiming that
18 he wanted to see the plant.

19 He has consistently and continues to deny and lie
20 about his sexual offenses. Throughout his records he
21 maintained that the first offense was a vindictive report by
22 an ex-girlfriend when he said that he was getting married,
23 even though the medical evidence showed that she was full of
24 semen at the time. It does not sound like anyone was -- and
25 he was convicted of the offense.

1 He has consistently said that he thought the last
2 offense occurred because of a misinterpretation of signals
3 even though it involved strangling her unconscious three
4 times and threatening to kill her.

5 So he continues to deny these offenses. He has
6 continued to say that he did not commit the assault with
7 intent to commit rape even though the victim was a stranger
8 who certainly had no reason to make up anything about him.
9 She described his clothes down to the last detail.

10 He denied to Dr. Mills that he ever injected heroin
11 even though the records indicates otherwise. He has claimed
12 that he only raised a fist at a teacher when actually he was
13 adjudicated for assault. So I think there is a consistent
14 pattern of deceit and deception on the record.

15 No. three, impulsivity or failure to plan ahead. I
16 did not score him either way on this item because I don't
17 have information from the records. Since he's denying
18 offenses I don't have information about the extent to which
19 he planned the offenses and I don't have sufficient
20 information about his personal life outside the offenses.

21 Irritability and aggressiveness as indicated by
22 repeated fights or assaults. He has I believe four charges
23 of battery as an adult, an assault adjudication as an
24 adolescent. His last rape was extremely violent. And when
25 you read the details of the domestic violence assaults for

1 one of which he was convicted of, you see a pattern of
2 aggressiveness and assaultive behavior that occurred over a
3 period of a number of months with several different victims
4 involved.

5 So I think the record is clear that he has a
6 history of assaultiveness in his past.

7 No. five -- at this point he's already met criteria
8 but he goes beyond meeting the minimum criteria -- reckless
9 disregard for safety or self or others. If you strangle
10 someone unconscious three times, you certainly are
11 disregarding their safety.

12 His sexual assault against an eight-month pregnant
13 woman show a disregard for her safety and for the safety of
14 the fetus.

15 And his use of heroin and drugs show a disregard
16 for his own safety.

17 So the multiple assaults, I think it's hard to say
18 that he has not shown a disregard for the safety of other
19 people.

20 "Consistent irresponsibility as indicated by
21 repeated failure to sustain consistent work behavior or
22 honor financial obligations." He certainly failed to --
23 what we know is that he failed to honor his parole
24 obligations by committing new sexual assaults on two
25 occasions and by failing his urine screen on three

1 occasions.

2 It's difficult to track his work history but he did
3 tell the presentence investigator that one job lasted for
4 three months. And they were not able to actually find the
5 company. He was fired from at least two jobs, one of which
6 he self-reported to Dr. Mills after he got into an argument
7 with the foreman. There are records that he was fired from
8 a second job after being late to work.

9 Lack of remorse is indicated by being indifferent
10 or rationalizing having hurt, mistreated or stolen from
11 another. I looked carefully in his records. I have no
12 indication of any remorse anywhere in the history, the
13 17-year history of incarceration I see no expressions of
14 remorse for the behavior.

15 In fact, he continues to deny the behavior and he
16 can't express remorse for something that he said didn't
17 happen.

18 Q. Now, in addition to Section A there, are there other
19 criteria that have to be satisfied?

20 A. Yes. He has to be 18 years old and he is. There has to
21 be evidence of conduct disorder under the age of 15 and
22 there is. He was arrested at 13 for truancy and
23 shoplifting. And he said he went through a receiving home
24 for a couple of months for shoplifting. And that really
25 doesn't occur if it's a first offense.

1 And, finally, that it has to, you can't make the
2 diagnosis if the person is acting out because he is
3 schizophrenic or psychotic in some way. But he -- there is
4 no evidence and never has been that he has any major mental
5 illness or major psychotic illness such as schizophrenia.

6 **Q.** Okay. Thank you.

7 Is Antisocial Personality Disorder an Axis II
8 disorder in the DSM?

9 **A.** It is an Axis II disorder.

10 **Q.** Can you explain the concept of axes in the DSM?

11 **A.** They divide the DSM into different axes. Axis I is
12 referred to as the major mental illnesses. Axis II are --
13 and they can be episodic. Axis II consist of personality
14 disorders and the personality disorders are considered to be
15 pervasive traits, an enduring pattern of maladaptive
16 functioning that interferes with their ability to get along
17 with others and function in the world.

18 **Q.** Okay. What importance in your analysis in this case do
19 you place on the fact that Antisocial Personality Disorder
20 is an Axis II rather than an Axis I disorder?

21 **A.** There is no real importance in a case like this. It
22 just states that I am familiar with both axes. So far as I
23 know all the states that have civil commitment, both Axis I
24 and Axis II diagnoses can be accepted because the
25 requirement is not typically related to which axis does this

1 fall into but does this lead to sexual offending. Is there
2 a nexus between the diagnosis and sexual offending.

3 And they require typically that it be a mental
4 abnormality or disorder and Axis II disorders are fully
5 listed in DSM-IV as mental disorders.

6 Q. Now, in your opinion is Antisocial Personality Disorder
7 as diagnosed in this case a serious mental disorder?

8 A. Well, in this case it's serious. As DSM-IV states
9 clearly, you don't assess seriousness by the category. You
10 don't say this category is serious and that category is not
11 serious. And I have a quote in my report that came straight
12 from the DSM-IV about that.

13 That across the categories people can be serious or
14 not serious within the same category. Now, if someone's
15 Antisocial Personality Disorder is involved in and leads to
16 strangulation of someone for serious assault, then it is
17 going to fall into the serious end of the continuum. And we
18 know that that's documented within DSM-IV because they have
19 a severity scale. And the severity scale specifically lists
20 recurrent violence to others as the most severe part of the
21 scale.

22 They have a scale, a global functioning scale from
23 zero to a hundred. And zero is the most serious, one
24 hundred is the least. And if you look at zero to one, and I
25 have it in here if you want, zero to one what it says,

1 repeated violence to others is listed as extremely serious.

2 Q. Did you score Mr. Graham on that scale?

3 A. Yes.

4 Q. Okay. And can you explain that?

5 A. Well, you look at the scale -- let me get this.

6 All right. I looked at the scale. One hundred
7 denotes superior functioning in a wide range of activities
8 and no symptoms. The lowest function on the scale, which is
9 one to ten, is so severe that it includes, quote, persistent
10 inability to maintain personal hygiene or serious suicidal
11 act with clear expectation of death. This lowest level also
12 includes, quote, persistent danger of severely hurting
13 himself or others (e.g., recurrent violence).

14 And that certainly applies to Mr. Graham.

15 Q. Are you aware whether Dr. Mills, the court-appointed
16 examiner in this case, also attempted to score Mr. Graham on
17 this scale?

18 A. I did.

19 Q. And --

20 A. I am aware.

21 Q. What was his score and what are your thoughts on that?

22 A. Well, he scored him at a 65. But if you look at the
23 description of a 65, you see that a 65, the description,
24 quote, some mild symptoms, e.g., depressed mood or mild
25 insomnia or some difficulty in social, occupational or

1 school functioning (e.g. occasional truancy) or theft within
2 the household but generally functioning pretty well, has
3 some meaningful relationships.

4 That, I do not -- it is my opinion that I do not
5 see how multiple rapes which includes violence, sadistic
6 elements and strangling someone unconscious can be equated
7 to occasional truancy or theft within the household.

8 **Q.** Okay. What, if any, correlation is there between
9 Antisocial Personality Disorder and violence?

10 **A.** It is one of the two diagnoses in DSM-IV that is most
11 linked to violence. The other being sexual sadism.

12 **Q.** And what is your understanding on how age affects the
13 typical person who is diagnosed with Antisocial Personality
14 Disorder, say, in their mid 30s?

15 **A.** Well, if somebody is not psychopathic because
16 psychopaths follows a different age pattern, if they are
17 antisocial without psychopathy, then they should be slowing
18 down their antisocial behavior about half, reduce it between
19 35 and 40.

20 **Q.** And have you examined Mr. Graham's conduct during that
21 same period of time?

22 **A.** Yes.

23 **Q.** And what does that suggest to you regarding whether
24 things are slowing down for him?

25 **A.** Well, between 1974 and 1986 he showed escalating

1 violence. The violence -- he started with an acquaintance
2 rape which did not have sadistic elements. The next rape
3 was more severe because he attacked a stranger where there
4 was no possibility of his interpretation of signals of an
5 acquaintance or a date or anything like that. He showed a
6 greater disregard for safety because the woman was eight
7 months pregnant.

8 **MR. GOLD:** Your Honor, just, I would object here.
9 The witness, it is my understanding from her testimony, is
10 characterizing the assault with intent to rape as a rape but
11 I would like the record to reflect that that's not the
12 charge or conviction.

13 **THE WITNESS:** I apologize.

14 With assault, he assaulted a pregnant woman. And
15 that had a different, some different characteristics because
16 that was a stranger which is a more severe form, as I said.
17 It also occurred in a public place and it occurred at three
18 o'clock in the afternoon. So it was more reckless and there
19 was a much greater chance of getting caught.

20 The third and last rape occurred as a result of a
21 home invasion of a stranger who he had not met previously
22 even though she was apparently a neighbor. That it had,
23 barely had sadistic elements as she was under his control
24 and had stopped persisting before he strangled her for the
25 third time -- the first time. So there was no reason for

1 the strangulation in terms of control.

2 So if Antisocial Personality Disorder were all and
3 he was not psychopathic and he was not paraphilic, he should
4 be slowing down. Instead he is 37, 38 years old and we see
5 his most violent rape yet. The violence is increasing, not
6 diminishing.

7 **Q.** Okay. Let's now turn to your diagnosis of paraphilia in
8 this case.

9 What is paraphilia generally?

10 **A.** Paraphilia has to do with urges, sexual urges, fantasies
11 or behaviors that involve various nonconsenting categories,
12 either nonhuman subjects or nonconsenting subjects or
13 children.

14 **Q.** Okay. Could you turn to Exhibit 21, please.

15 **THE COURT:** Now, what you have up there, is that
16 from the DSM-IV?

17 **MR. SAVERY:** It is, Your Honor.

18 **THE COURT:** This is a page from there?

19 **MR. SAVERY:** Correct.

20 **THE COURT:** Okay.

21 BY MR. SAVERY

22 **Q.** Could you tell us what is in Exhibit 21?

23 **A.** Well, Exhibit 21 has the diagnostic DSM-IV-TR section on
24 paraphilic disorders.

25 **Q.** Okay. And I have put on the screen now page 566. Is

1 this a page from Exhibit 21?

2 **A.** Yes.

3 **Q.** And can you tell us what this section of the DSM
4 discusses?

5 **A.** It is a description and sets criteria for the
6 Paraphilias.

7 **Q.** Okay. Now, in using what has been put on the screen,
8 can you explain to us what the criteria are for general
9 paraphilias?

10 **A.** "Intense sexually arousing fantasies, sexual urges or
11 behaviors generally involving nonhuman objects, the
12 suffering or humiliation of oneself or one's partner, or,
13 three, children or other nonconsenting persons that occur
14 over a period of at least six months (Criterion A)."

15 **Q.** And is there a Criterion B?

16 **A.** Yes.

17 **Q.** And does that begin down near the bottom, "For the
18 remaining Paraphilias"?

19 **A.** "For the remaining Paraphilias, the diagnosis is made if
20 the behavior, sexual urges, or fantasies cause clinically
21 significant distress or impairment in social, occupational,
22 or other important areas of functioning."

23 **Q.** Okay. Now, does this section of the DSM go on to
24 identify specific types of paraphilias?

25 **A.** Some, yes.

1 **Q.** Can you tell us which ones are identified in this
2 section?

3 **A.** It identifies pedophilia, exhibitionism, voyeurism,
4 sexual sadism and I believe there are a few more.

5 **Q.** Okay.

6 **A.** Fetishism, Frotteurism, Sexual Masochism and Transvestic
7 Fetishism.

8 **Q.** And what else? Is there another?

9 **A.** Paraphilia NOS.

10 **Q.** What is Paraphilia NOS?

11 **A.** Well, it's for coding paraphilic disorders that do not meet
12 criteria for any of the specific categories. And then they
13 give some examples that say that it is not limited to those
14 examples.

15 **Q.** Okay. And is this the section of the DSM that addresses
16 Paraphilia NOS?

17 **A.** Yes.

18 **Q.** And is NOS short for Not Otherwise Specified?

19 **A.** It is.

20 **Q.** Is Paraphilia NOS generally accepted in the psychiatric
21 and psychological community as a legitimate diagnosis of a
22 mental disorder?

23 **A.** Yes. DSM-IV is the bible of what is accepted and what
24 is not in terms of mental health.

25 **Q.** Now, what is your specific diagnosis of Mr. Graham?

1 **A.** Paraphilia NOS based on nonconsent.

2 **Q.** Now, is that a specific type of paraphilia that's
3 separately listed in the DSM?

4 **A.** It is not separately listed but it's encompassed in this
5 category.

6 **THE COURT:** It is what?

7 **THE WITNESS:** Encompassed in this category.

8 **THE COURT:** Does it say so?

9 **THE WITNESS:** Well, it gives the example in the
10 *Casebook* written by the people who wrote --

11 **THE COURT:** Forget the *Casebook*. The *Casebook* is
12 another issue. What about the manual itself?

13 **THE WITNESS:** The manual says nonconsent, based on
14 nonconsent.

15 **THE COURT:** Where is that? Show me that.

16 **THE WITNESS:** "The essential features of a
17 paraphilia --"

18 **THE COURT:** Give him an opportunity to put it up on
19 the screen.

20 **MR. SAVERY:** And it is the page, Your Honor, that
21 we already addressed. Let me find a copy of it.

22 (Pause in proceedings.)

23 **MR. SAVERY:** I seem to have lost track of it here.

24 I am putting it up on the screen.

25 **THE WITNESS:** "The essential diagnostic features,

1 the essential features of a paraphilia are recurrent intense
2 sexually arousing fantasies, sexual urges or behaviors
3 generally involving nonhuman subjects, the suffering or
4 humiliation of oneself or one's partner, and, three,
5 children or other nonconsenting persons that occur over a
6 period of at least six months."

7 BY MR. SAVERY

8 Q. Now, you say that Paraphilia NOS (Nonconsent) is not
9 separately identified as a category of paraphilia in the
10 DSM; is that right?

11 A. Yes.

12 Q. How can you diagnose it if it is not separately
13 identified?

14 A. Well, it's very clear that they intended it to be
15 diagnosed. For one thing Frances who edited DSM-IV and who
16 has been generally critical of the way people are diagnosing
17 it nonetheless said this distinction, the distinction he had
18 made does not mean that Paraphilia NOS cannot or should not
19 be used to describe some individuals who commit coercive
20 sexual acts --

21 **THE COURT:** Wait. We are getting on to something
22 different. I am asking a very simple question.

23 Underline for me so I see the words you are relying
24 on the diagnostic feature that would cover this case.

25 **THE WITNESS:** "No. three, children or other

1 nonconsenting persons."

2 **THE COURT:** That is it?

3 **THE WITNESS:** Well, that's the only place that they
4 specify.

5 **THE COURT:** Okay.

6 **MR. GOLD:** Your Honor, the witness was just reading
7 the statement of the editor of the DSM Task Force but did
8 not identify what she was reading from.

9 **THE COURT:** I didn't hear her do that.

10 **MR. SAVERY:** She did, Your Honor.

11 BY MR. SAVERY

12 **Q.** Could you identify, Dr. Salter, what you read from?

13 **A.** The editor of DSM-IV Alan Frances in an article
14 defining, called, "Defining mental disorder when it really
15 counts, DSM-IV-TR and SVP/SDP statutes," that's the article
16 I started to mention which in my opinion helped clarify
17 somewhat the intentions of the committee since this was the
18 editor.

19 **THE COURT:** Okay.

20 BY MR. SAVERY

21 **Q.** Dr. Salter, have you heard the term "paraphilic rapism"?

22 **A.** Yes, of course.

23 **Q.** Can you explain what that is?

24 **A.** Well, it is done by many different terms, the latest
25 beings Paraphilia NOS; but it is the notion that there are a

1 group, a subgroup of rapists who have sexual, who are
2 sexually aroused by forcing somebody to have sex. It is not
3 true of every rapist. It is just a subgroup.

4 Q. And did you prepare a bibliography of resources that
5 address this issue of Paraphilia NOS (Nonconsent)?

6 A. I did.

7 Q. And if you'd turn to Exhibit E for identification.

8 Can you tell us what this document is?

9 A. That was the unannotated version of the bibliography.

10 Q. Okay. And what are these resources that you list in
11 this bibliography?

12 A. They are resources that either discuss the condition,
13 Paraphilia NOS refers to one or it has been called at times
14 for the DSM series Paraphilia, Paraphilic Rapism Disorder or
15 specifically discuss Paraphilia NOS in the DSM.

16 Q. Okay. Is it a comprehensive list?

17 A. Oh, no. There are many, many articles in the research
18 that discuss this. These are just some of them.

19 Q. Now, were any of the authorities that are listed in
20 Exhibit E prepared by individuals who were involved in
21 generating the DSM-IV or the DSM-IV-TR?

22 A. Yes.

23 Q. Let's start with the *Casebook*. Can you tell us what the
24 *Casebook* is?

25 A. The *Casebook* was intended to accompany the DSM-IV

1 series. It was edited by the person who initially more than
2 anybody else was the force behind the DSM book, Robert
3 Spitzer. All of the people who prepared the *Casebook*, the
4 authors, were on the DSM-IV committee.

5 **Q.** Okay. And what does the *Casebook*, what is it intended
6 to be used for?

7 **A.** The intent of the *Casebook*, as the authors say in their
8 introduction, is to help people with differential diagnoses.
9 You have this nice manual that tells you what the diagnoses
10 are and what the criteria are but it doesn't apply them to
11 real world cases. So this was a differential diagnosis is
12 the point of the *Casebook*.

13 **Q.** Okay. And just before we jump into it, who is Robert
14 Spitzer?

15 **A.** Robert Spitzer is probably one of the, is one of the
16 leading psychiatrists in this country. And he was the
17 person who edited DSM-III when Paraphilia NOS was added to
18 DSM-III. And he really has been the driving force behind
19 the DSM series.

20 **Q.** Okay. And who is the last doctor listed here, Michael
21 First?

22 **A.** Michael First was involved and the person -- he was the
23 overall editor I believe of the DSM-IV and involved in the
24 *Personality Disorder Workbook*.

25 **Q.** In what ways has the *Casebook* acknowledged Paraphilia

1 NOS (Nonconsent)?

2 **A.** Well, quite specifically it gives a case and says a
3 course of paraphilic rapism. It's the case of someone who
4 had fantasies of rape and who was driven to rape by his
5 urges to have sex with someone against their will. And it
6 specifically says that they should be diagnosed as
7 Paraphilia NOS. I can show it to you if you would like.

8 **Q.** Sure. Well, I have got something up on the screen now.
9 And this is -- do you recognize this as coming from the
10 *Casebook*?

11 **A.** Yes. And it was called -- they gave names to all the
12 cases. It was called, "The Perfect Relationship."

13 **Q.** Okay. And so this is the section of the DSM that
14 addresses the scenario that you just discussed?

15 **A.** Yes. It refers also to his plethysmograph findings,
16 that he showed erection to stimuli depicting females in
17 position of subjugation and it's a discussion of this case
18 with a little bit of case history and characteristics.

19 **Q.** Okay. Now, following the laying out of the facts here,
20 is there a section, "Discussion of Perfect Relationship"?

21 **A.** Yes.

22 **Q.** And what generally is this discussion section? What is
23 that intended to do?

24 **A.** Well, it's to discuss the case material that was just
25 presented.

1 **Q.** Okay. If we turn to the next page here which is page
2 173 -- I apologize for the handwriting on this. Can you
3 read from that first paragraph on this page beginning with,
4 "Most rapes" right there (indicating).

5 **A.** "Most rapes are probably committed by men whose quite
6 ordinary nonparaphilic sexual preferences, many of whom
7 would meet the criteria for Antisocial Personality Disorder,
8 more rare than rape committed by men with mental
9 retardation, a psychotic disorder or drug intoxication or
10 dissociative identity disorder. However, some rapists,
11 particularly serial rapists, have an aberrant sexual drive
12 of paraphilia, a disorder in which there are intense sexual
13 urges and sexually arousing fantasies involving either
14 nonhuman objects or the suffering or humiliation of oneself,
15 one's partner, children or other nonconsenting persons."

16 **Q.** All right. Now, if we move down toward the bottom of
17 this section here, the paragraph beginning, "Jim experienced
18 recurring eroticized urges." If you start with the word,
19 "however," can you read the remainder of that paragraph.

20 **A.** "However, his rape behavior can best be understood as a
21 manifestation of a specific paraphilia because his erotic
22 arousal depended on having a nonconsenting partner. During
23 the development of DSM-III-R the term 'paraphilic Coercive
24 Disorder' was suggested for this particular kind of
25 paraphilia. The category has never been officially

1 recognized. Therefore, Jim's disorder would be coded as
2 Paraphilia Not Otherwise Specified, DSM-IV-TR, page 576."

3 **Q.** Now, is there a new edition of the *Casebook*?

4 **A.** No.

5 **MR. SAVERY:** May I approach the witness, Your
6 Honor?

7 **THE COURT:** Yes.

8 BY MR. SAVERY

9 **Q.** I am handing you now a book. Can you tell us what the
10 title is of that book?

11 **A.** *Treatment, Companion to the DSM-IV-TR Casebook*.

12 **Q.** Okay. And what does that involve?

13 **A.** Well, they say quite specifically that their first book
14 was on differential diagnoses. And the second casebook is
15 on treatment. And they mention specifically that -- okay.

16 Although some of the cases in the *DSM-IV-TR*
17 *Casebook* mention treatment, the discussions were focused,
18 that the patient received, the discussions were focused
19 exclusively on diagnostic issues. In this book we have
20 taken the next step for 34 cases, all but three from the
21 *DSM-IV-TR Casebook*. We have invited experts, many world
22 renowned, to discuss their approach to the treatment of a
23 case in a specialized area.

24 So they published two books. One was on
25 differential diagnoses and one was on treatment. And they

1 tried to provide continuity between them but, by having some
2 overlap in the cases.

3 **Q.** So the treatment book that you're holding, you don't
4 understand that to be intended to replace the *Casebook*;
5 right?

6 **A.** No. I think if you read this, it makes it very clear
7 that it's in addition to the *Casebook* and that the *Casebook*
8 is on differential diagnosis and this book is on treatment.
9 The *Casebook* only mentions treatment. It does not address
10 it.

11 **Q.** Okay. Could you turn to page 319 of the diagnosis book.
12 And what appears on page 319?

13 **A.** It's an index by DSM-IV-TR, diagnosis of the -- of the
14 cases that are presented in the treatment book.

15 **Q.** Okay. So it lists the types of diagnoses from the
16 DSM-IV that are addressed in that treatment manual?

17 **A.** Yes.

18 **Q.** Okay. Now, approximately how many items are listed
19 there?

20 **A.** I have to count them.

21 32, I count 32.

22 **Q.** 32, okay.

23 **THE COURT:** Could we go back to the other, the
24 first one that you put up?

25 **MR. SAVERY:** Sure.

1 **THE COURT:** And there was a phrase, a line that you
2 mentioned. We didn't seem to concentrate on it. I may be
3 misremembering. It said children and nonconsensual --

4 **THE WITNESS:** Other nonconsenting persons.

5 **THE COURT:** Now, is that enough to get you over the
6 line? Are you relying on that sentence?

7 **MR. SAVERY:** Yes, Your Honor. That is enough to
8 fall within the general category of paraphilia. And in
9 terms of where this specific --

10 **THE COURT:** No, I mean is that enough to qualify it
11 as part of the brethren of DSM-IV? In other words, to be
12 included, to be authenticated by the DSM-IV?

13 **MR. SAVERY:** Is it enough simply to satisfy the
14 definition in that?

15 **THE COURT:** Yes.

16 **MR. SAVERY:** I am not sure. I can ask the witness
17 if --

18 **THE COURT:** What are you relying on? I mean, is
19 that what you are going to argue to me?

20 **MR. SAVERY:** No, I think what we will argue to you
21 is that this conduct falls within and it's generally
22 accepted in the psychological community to fall within --

23 **THE COURT:** But you are not relying on that
24 language? You are not seizing on the fact that it says no
25 consent?

1 **MR. SAVERY:** We are, Your Honor, because that is
2 required for any paraphilia. In other words, those initial
3 criteria that are laid out at the beginning of that section
4 should be satisfied for any paraphilia. Here it's satisfied
5 because one of the criteria says nonconsent. But at the
6 same time we argue that this specific paraphilia that is
7 diagnosed in this case falls within the subcategory of
8 Paraphilia NOS.

9 And Dr. Salter has --

10 **THE COURT:** But it is not specifically identified
11 in the manual.

12 **MR. SAVERY:** It is not specifically named as an
13 example of Paraphilia NOS diagnoses.

14 **THE COURT:** You are saying it is accepted by way of
15 practice by people who deal in this area of the profession?

16 **MR. SAVERY:** I want to be cautious. Yes, we are
17 saying that; but at the same time we are saying that it does
18 satisfy the criteria for paraphilia generally and it does
19 fit within the NOS category. It doesn't have to be
20 separately listed for it to fit within the NOS category.
21 That's I guess the short answer.

22 And so what we do beyond that is we rely on what
23 are the authorities out there, what do they say on this
24 issue and Dr. Salter's own experience.

25 **THE COURT:** Okay.

1 BY MR. SAVERY

2 Q. Just going back to the treatment manual, Dr. Salter, you
3 mentioned that it identifies or that it addresses 32
4 different diagnoses from the DSM-IV; is that right?

5 A. Yes.

6 Q. Okay. Does that suggest to you that all of the other
7 DSM diagnoses are now no longer valid?

8 A. No, it does not, no.

9 Q. All right.

10 A. These are only some of the diagnoses. They didn't try
11 to produce an exhaustive treatment manual which covered
12 every diagnosis in the DSM-IV.

13 Q. Okay. And do they address in that manual Paraphilia NOS
14 (Nonconsent)?

15 A. No, I don't think they have it in the treatment book.

16 Q. Okay. Now, referring back to Exhibit E, there is an
17 article here that is listed on page two authored by a First
18 and Halon, H-A-L-O-N?

19 A. Yes.

20 Q. Again, who is First?

21 A. He was the editor of DSM-IV.

22 Q. Okay. And can you explain in what way this article
23 supports the existence of Paraphilia NOS (Nonconsent)?

24 A. Well, First is generally critical of the way it's been
25 diagnosed. And his argument is that there are people out

1 there who are simply diagnosing it every time you have a
2 repeat rapist without concern for the underlying condition.

3 And the underlying idea behind paraphilia is that
4 the person is sexually aroused and attracted to whatever it
5 is, dead bodies, nonconsent, whatever the object of that
6 attraction is, and that people should try in their
7 differential diagnosis to make sure that they are honoring
8 that, that they are not simply diagnosing someone as a
9 rapist because he's committed -- a paraphilic rapist because
10 he's committed a lot of rapes. Because there are people who
11 commit rapes for other reasons.

12 But he specifically says, he specifically says that
13 it exists and can be diagnosed.

14 **Q.** Okay. And do you agree with his position insofar as
15 you've described it?

16 **A.** Well, generally I do agree. I have run into situations
17 where people said -- and I have had evaluators say to me if
18 he has multiple rapes he must be paraphiliac. I don't think
19 that's true.

20 We have typologies of sex offenders going back 30
21 years. We have plethysmograph studies. What they all show
22 is that some rapists are motivated by anger. Some rapists
23 are antisocial only and simply want sex and they don't care
24 if the other person wants it or not.

25 And we have clear case studies and research

1 evidence to tell us there is another category of rapists.
2 And that is the category of rapists who are sexually aroused
3 by rape, by forcing sex on someone.

4 So generally I agree with that basic point that
5 First makes, that you have to make this diagnosis based on
6 whether or not you can infer from the evidence that he's
7 sexually attracted to rape. He also says -- and I can't
8 seem to come up with it -- but he also says that rapists
9 don't always tell you the truth so you can't just go by what
10 they say.

11 **MR. GOLD:** Your Honor, I'd like to enter an
12 objection or a request at this time. It's not entirely
13 timely but the witness mentioned this bibliography was
14 authored by her but that she had given to the government an
15 annotated version of the bibliography which I imagine the
16 government has taken out the annotations.

17 We would ask that the annotated version be produced
18 to us since it seems that her analysis of these sources
19 forms some of the basis of her opinion.

20 **MR. SAVERY:** We have no objection, Your Honor.

21 **THE COURT:** Okay. You turn it over. This is a
22 good time, maybe you can do it during the recess.

23 We can break now till 2:15; is that convenient?

24 **MR. SAVERY:** That's fine.

25 **THE COURT:** Okay.

1 **THE CLERK:** All rise for the Honorable Court.

2 Court is in recess.

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4 (Luncheon recess.)

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AFTERNOON PROCEEDINGS

THE CLERK: All rise for the Honorable Court.

THE COURT: Good afternoon, everybody.

COUNSEL: Good afternoon, Your Honor.

THE COURT: Be seated, please.

You know, I am going to have to leave at about four o'clock, maybe five past four. I have a physical therapy appointment in Marblehead and it takes me that long to get there in traffic.

Okay. Sit down.

Go ahead. There was some concern about an exhibit.
Did you work that out?

MR. SINNIS: Oh, yes. In terms of the annotated bibliography, Your Honor?

THE COURT: Yes.

MR. GOLD: Yes, we did work that out.

THE COURT: Okay. So we are all set to continue.

Go ahead.

MR. SAVERY: Thank you, Your Honor.

ANNA CAROL SALTER, Resumed

DIRECT EXAMINATION, (Cont'd.)

BY MR. SAVERY

Q. Dr. Salter, before the break you were addressing an article offered by Doctors First and Halon; is that right?

A. Yes.

1 **Q.** Okay. Now, does Dr. First offer some criticism in that
2 article regarding the use of Paraphilia NOS (Nonconsent)?

3 **A.** Yes, he does.

4 **Q.** Can you explain that for us?

5 **A.** He is concerned that many people or at least some people
6 are diagnosing it on every rapist that has more than one
7 rape. So they are saying that the evidence for Paraphilia
8 NOS is that simply if they have more than one rape, they
9 must have Paraphilia NOS.

10 **Q.** Okay. Does he question that the diagnosis is real in
11 that article?

12 **A.** No, he doesn't question that the diagnosis is real nor
13 does he question that you can use Paraphilia NOS for it. He
14 says that there are some people who diagnose it for every
15 rapist with multiple rapes and there are some people who
16 think you can't use it at all.

17 And what he says is our inclination is to come down
18 somewhere in the middle on the appropriateness of using the
19 Paraphilia NOS category as the basis for the claim that the
20 individual's sexual offenses are driven by mental disorder.

21 There are certainly some dangerous sexual offenders
22 in our society whose offenses are clearly driven by a
23 paraphilic sexual arousal pattern involving fantasies and
24 urges to commit rape and it may be appropriate to apply a
25 diagnosis --

1 **THE COURT:** This is not an exhibit; right?

2 **MR. SAVERY:** Correct.

3 **THE COURT:** That she is reading from.

4 **MR. SAVERY:** That's right.

5 **THE WITNESS:** -- of Paraphilia NOS to such
6 individual.

7 **THE COURT:** You are relying on that in your
8 opinion?

9 **THE WITNESS:** In my opinion.

10 **THE COURT:** Okay.

11 **MR. GOLD:** And for the record, Your Honor, I'd like
12 to have it made clear that she was reading and also what
13 source she was reading from.

14 **THE COURT:** Okay. That is fair.

15 **MR. SAVERY:** Sure.

16 BY MR. SAVERY

17 **Q.** Doctor, could you just particularize where you are
18 reading from and on what page?

19 **A.** That is a quote from page 452 that starts with, "Our
20 inclination" and ends, my quote does, "With such
21 individuals." It is from, *The Use of DSM Paraphilia*
22 *Diagnoses in Sexually Violent Predator Commitment Cases* by
23 Michael B. First and Robert Halon. And it is from the
24 Journal of the Academy -- American Academy of Psychiatry and
25 Law.

1 **Q.** Okay. Is that a peer-reviewed journal?

2 **A.** Yes.

3 **Q.** Okay. One of the other items that is listed in the
4 bibliography is an article by a DeClue?

5 **A.** Yes.

6 **Q.** Can you tell us what that article is?

7 **A.** Well, the argument by DeClue --

8 **Q.** Sorry. Before you get to the argument, can you just
9 tell us what the article is?

10 **A.** The article is by G. DeClue. It is called "Paraphilia
11 NOS, (Nonconsenting) and Antisocial Personality Disorder,"
12 *Journal of Psychiatry and Law*, 2006 by --

13 **THE COURT:** Hold it.

14 (Pause in proceedings while the Court took a phone
15 call.)

16 **THE COURT:** Go ahead. Thank you.

17 BY MR. SAVERY

18 **Q.** Have you considered this article to be reliable
19 authority in your professional field?

20 **A.** Yes.

21 **Q.** Can you explain in what way this article supports the
22 existence of Paraphilia NOS (Nonconsent) as a diagnosis?

23 **A.** Well, he is answering people that he believes are
24 critics of using the diagnosis Paraphilia NOS for paraphilic
25 rapism. And what he says is that one of the arguments that

1 is presented is that the plethysmograph studies show that
2 rapists typically respond to rape and they also respond to
3 consenting sex. And what he says is that is no reason not
4 to diagnose him as Paraphilia NOS.

5 If you, for example, are an necrophiliac, if you
6 have sex with dead bodies and you also have sex with live
7 bodies, it doesn't mean you are not a necrophiliac.

8 If you have sex with animals, you still have
9 bestiality if you are attracted, sexually attracted to
10 animals. And it's irrelevant whether or not you also have
11 sex with people. And that the argument that you can't use
12 this for rapists because rapists also enjoy consenting sex
13 is invalid.

14 Q. Okay. You mentioned something called a plethysmograph?

15 A. Yes.

16 Q. Can you explain what that is?

17 A. The plethysmograph is a small gauge. It fits on the
18 offender's penis. He's in a room alone. There are wires
19 that go from the gauge to a computer in another room. He
20 typically has on headphones and he is listening to stories
21 of different types of sex. Typically sex with children of
22 different ages and consenting sex and rape and sadistic sex.
23 There are no children involved in this. These are stories
24 that are read by adults.

25 The machine measures what he gets sexually aroused

1 to. It directly measures the size of the erection. And
2 these studies are typically used in research and sometimes
3 in treatment in order to sort out what a person is sexually
4 aroused by.

5 **Q.** Okay. Thank you.

6 I am now turning to page 508 of the DeClue article.
7 And if you could read for me, it's up on the screen now, the
8 paragraph beginning with, "What about patterns."

9 **A.** I was asked to bring this with me (indicating) when I
10 read.

11 **Q.** Okay.

12 **A.** "What about patterns of sex acts that would be
13 normatively popular with consenting persons but are
14 inflicted on nonconsenting persons? There appears to be
15 general acceptance among most psychiatrists, psychologists
16 and sexologists that a person can have a paraphilia
17 involving rape.

18 For example, Money in *Lovemaps* in 1989, page 48,
19 writes about the clinical syndrome named raptophilia, the
20 Latin derivative, or biastophilia, the Greek derivative.
21 And the syndrome of raptophilia, raptophilia genital arousal
22 and eventually the orgasm are contingent upon having a
23 partner who as a captive is forced to yield sexually under
24 condition of threat, assault or injury."

25 **Q.** Okay. Now, I'm going to turn to Page 511 of that same

1 article. And if you could read the bottom paragraph,
2 please.

3 **A.** "The DSM-IV-TR does not provide diagnostic criteria for
4 any of the paraphilias coded under Paraphilia NOS, including
5 the list of paraphilias such as telephone scatology,
6 necrophilia or zoophilia or the unlisted paraphilias such as
7 Paraphilia NOS (Nonconsenting). My reading of DSM-IV-TR
8 suggests that Paraphilia NOS (Nonconsenting) should be
9 diagnosed if the following criteria are satisfied. Over a
10 period of at least six months recurrent, intense sexually
11 arousing fantasies, sexual urges or behaviors involving
12 sexual activity with a nonconsenting person and, B, the
13 person has acted on these urges or the sexual urges or
14 fantasies caused distress or interpersonal difficulty. In
15 the absence of reliable data about a person's sexual
16 fantasies, urges, or in spite of a person's claims that he
17 has no sexual fantasies or urges to engage in sexual
18 behavior with nonconsenting persons, the presence of
19 Paraphilia NOS (Nonconsenting) is evident if the person
20 repeatedly engages in sexual behavior with nonconsenting
21 persons over a period of at least six months."

22 **Q.** All right. Now, can you tell us what your views are on
23 that paragraph and his explanation?

24 **A.** I don't agree with him. I think it's overly inclusive.
25 I think if you simply -- I agree with First on this. I

1 think if you simply diagnose everybody that had multiple
2 rapes as a paraphilia, you would also include people who
3 raped repeatedly for other reasons, because they are
4 antisocial, because they are what we call opportunistic
5 rapists who rape in the course of a burglary for example,
6 because they are angry rapists who are taking out their
7 anger on women. I don't -- I think that's too liberal.

8 I agree more that we have to carefully analyze
9 every case for indications of whether or not there are other
10 explanations other than a paraphilic rapism which accounts
11 for them all.

12 Q. Okay. And is that view in line with what you understand
13 First to be saying?

14 A. That's in line with First and Doren and I believe the
15 majority of the people.

16 Q. Okay. Lastly if you could just read in this sentence
17 here (indicating) beginning with, "In my opinion."

18 A. "In my opinion a repetitive pattern of sexual behavior
19 with nonconsenting persons is sufficient for the diagnosis
20 of Paraphilia NOS (Nonconsenting) which a mental abnormality
21 that in some cases could provide a diagnosis for meeting the
22 criteria for civil commitment as a SVP."

23 Q. Okay. And so you agree with this to the extent that it
24 recognizes Paraphilia NOS (Nonconsenting) as a diagnosis; is
25 that fair to say?

1 **A.** Yes, I agree with that. I think that's clear. There
2 are studies of what states who use civil commitment laws and
3 what they show is that this is a very common diagnosis.

4 **Q.** Okay. And I don't want to go through each of articles
5 in the bibliography but I do want to focus on at least one
6 more. And this is the book written by Doren.

7 Can you tell us who Dennis Doren is?

8 **A.** Dennis Doren is now retired but he was head of
9 evaluation for the government, mental health. Essentially
10 he did the, was in charge of the unit that did the civil
11 commitment evaluations for the State of Wisconsin.

12 He also wrote what I think is generally considered
13 the lead book in the field, *Evaluation of Sex Offenders:*
14 *Civil Commitment and Beyond*. And he wrote a whole series of
15 articles particularly on diagnosis and on the actuarial
16 instruments which have been very influential in the field.

17 **Q.** Okay. Is the *Evaluating Sex Offender* book, is that
18 listed in your bibliography?

19 **A.** Yes.

20 **Q.** Okay. Can you describe what, if any, relationship you
21 have with Dr. Doren?

22 **A.** He's a colleague and a personal friend.

23 **Q.** Okay. Now, is his book *Evaluation of Sex Offenders*
24 relied on as an authoritative source by those in your
25 profession?

1 **A.** Well, it certainly is. Even Zander who has really
2 attacked him on many issues wrote extensively in one of his
3 articles on the influence that Dennis Doren's book has had.
4 And he mentioned that it was on the reading list for the
5 American -- let me get this right -- Forensic -- one of the
6 diplomat boards, the American Board of Forensic Psychology
7 as a recommended reading for their exam for diplomate
8 status.

9 **Q.** Okay. And can you briefly describe for us what it is
10 that Doren's book tells us on Paraphilia NOS (Nonconsent) as
11 a legitimate diagnosis?

12 **A.** Well, Doren accepts, as do many others, the notion that
13 Paraphilia NOS is the appropriate designation for people who
14 have sexual urges to rape. His position is also that not
15 every rapist has Paraphilia NOS, that there are other
16 reasons for raping.

17 What he attempted to do in this book that many
18 people found useful is to delineate some criteria for
19 distinguishing between when you should use it and when you
20 shouldn't use it. And it was an advance because the
21 category is poorly delineated in the DSM-IV-TR.

22 **Q.** Okay. And I'm going to turn to, I'm going to put this
23 up on the screen, page 67. And do you recognize this as
24 being from Dr. Doren's book?

25 **A.** Yes.

Q. And, again, that book is *Evaluating Sex Offenders: A Manual For Civil Commitments and Beyond?*

A. Yes.

Q. Could you please read into the record the first full paragraph on that page beginning with, "Despite the potential arguments."

A. "Despite the potential arguments to be made about the limits to what we know and the edges or thresholds for where a rape-related paraphilia begins, there does not appear to be a meaningful argument against the idea that at least some rapists clearly meet the DSM-IV criteria for a paraphilia. If the offender has repetitively and knowingly enacted sexual contact with nonconsenting persons over a period of at least six months specifically for sexual arousal to nonconsenting interaction, and that behavior has caused him significant impairment in social, occupational or other areas of functioning, then criteria for paraphilia are met."

Q. Okay. Now, is this a set of criterion or discussion of criteria that you applied in this case?

A. Well, in the section he has nine different criteria that he suggests looking at. It's not all in that paragraph.

Q: Okay. Are you able to tell us what those criteria are?

A. Yes. He says that these are things to consider in making this distinction.

First of all, is there evidence that he was

1 sexually aroused to something that he clearly knew was not
2 consensual. And what he's trying to eliminate here are the
3 I know she's -- the date rape situations, she's saying no
4 but she really means yes. Where the person, there is some
5 kind of distorted perception of the victim's reaction. So
6 is it in a situation where it is absolutely clear that the
7 sexual contact is forced and is there evidence that he was
8 sexually aroused and did not lose his arousal when it became
9 clear that the contact was forced. So, for example,
10 ejaculation would be a sign that he continued his sexual
11 arousal.

12 The second one was repetitive patterns. There are
13 repetitive patterns within the rape. There is some kind of
14 sexual script that you can identify as common from one rape
15 particularly to another.

16 The third one is are virtually all of his crimes
17 sexual. In other words, if you have an antisocial person
18 who is raping because he just generally takes what he wants,
19 and it may be money, it may be sex, you typically see many,
20 many other nonsexual crimes as well. So one percentage of
21 these crimes are sexual.

22 Fourth, if the person is willing to have consensual
23 sex, and there are cases like this, does he rape them
24 anyway? This sometimes does occur in relationships or even
25 in, even in one-night stands where the person was willing to

1 have sex and he beats them up and raped them anyway.

2 Fifth, high frequency rapes. And if they're out
3 free, are they raping within a particular period of time or
4 are they raping as soon as they get out of prison? You
5 can't easily rape a woman in prison so he mentioned when
6 they get out of prison do they rape pretty, very quickly and
7 particularly if they're still under supervision.

8 Six, do they rape in situations where there is a
9 high likelihood of getting caught? In his opinion that
10 suggests that the pressure to rape, that the desire to rape
11 is so strong that it's outweighing other factors.

12 Seven, do they have concomitant access to
13 consenting sex partners? Are they living with someone? Do
14 they have access to regular sex?

15 Eight, do they have various type of victims? There
16 are some paraphilic rapists that will use -- that want to
17 rape somebody and they don't actually care who. They may
18 not actually know who is home when they enter a house.

19 And, nine, is there evidence of a rape kit.

20 **Q.** Okay. Now, did you apply those criteria here?

21 **A.** I did. This isn't all I applied but I did look at
22 Dennis Doren's work.

23 **Q.** Okay. Can you explain to us then how you went about
24 concluding that Mr. Graham has Paraphilia NOS (Nonconsent)?

25 **A.** Well, in general the first thing I did was look for

1 other reasons for the rape. Rapes where I believe that
2 Knight and Prentky's typology of rapists is the most
3 empirically backed so one of their types is opportunistic
4 rapist. So I looked at the record to see if, for example,
5 he went into a burglary and then accidentally found a woman
6 alone and raped her, any pattern there, any pattern like
7 that, so you have to rule that out.

8 I also looked, this is another category, is
9 basically an angry rapist who just doesn't like women and he
10 is using that as one woman somewhere back in his past,
11 decides that all women are deceitful bitches and typically
12 does a blitz attack where he attacks a woman, beats them
13 really badly, often rapes them and then goes on. What you
14 see in those cases is a frenzied attack. And what we had
15 here was not a frenzied attack. It was a period of time,
16 let's say the last one, and then we have a very considered
17 strangulation and, "I'm just going to have to put you out
18 for a while."

19 This is -- I have seen and dealt with cases of
20 frenzied attacks where women were actually even killed. And
21 the characteristics of those attacks is the extreme anger
22 and violence that occurs. But this was not, there was no
23 evidence of anger in this assault.

24 So I then, so I looked at that. So I looked at
25 other alternatives. Do we have any other ways to explain

1 these rapes other than the paraphiliac interest in rape.

2 And there really wasn't.

3 I also looked at Doren's criteria. Was it
4 absolutely clear to Mr. Graham that this woman was not
5 consenting. Well, yes, he threatened to kill her in order
6 to subdue her and then he strangled her on three different
7 occasions.

8 Q. You're referring specifically to the last incident; is
9 that right?

10 A. I was referring specifically because that's the latest.

11 Q. How about the prior incidents?

12 A. Well, the, he could -- one could argue -- I'm not
13 arguing -- but you could argue that in the car with the
14 woman that he picked up, he had some reason --

15 MR. GOLD: Objection if she is not making the
16 argument.

17 THE COURT: Well, she is giving an opinion.

18 MR. SINNIS: She is saying it is not her opinion.

19 THE COURT: I think that is her opinion.

20 MR. SAVERY: She's going to explain what her
21 opinion is if we give her a chance.

22 THE WITNESS: It is my opinion that it is possible
23 to ask the question about whether he resorted to first rape.
24 Beyond that point it isn't because he attacked a stranger on
25 a path and attacking a stranger, an eight-month pregnant

1 woman in a public place in the middle of the afternoon on a
2 path is not consistent with thinking that the rape was
3 consensual, that was sex was consensual. That he clearly
4 knew that that was nonconsensual interaction by its very
5 nature. Going in -- pushing his way in a woman's house who
6 is screaming and trying to fight him off, there is clear
7 evidence that he understood the rape was not consensual.

8 And he, at least in the -- and he continued with
9 the rape anyway. He was able to successfully rape the
10 woman. So the knowledge that she was not consenting and had
11 to be threatened with her life in order to consent and that
12 she was screaming and frightened, this did not stop the
13 attack and it did not diminish his arousal. So that was one
14 of Dr. Doren's categories.

15 We don't have a repetitive pattern across the rapes
16 because the rapes continued to escalate in violence. And we
17 have a repetitive pattern within the last rape but there is
18 no explanation for the strangulation on three occasions
19 except the sexual script. She was already subdued. So what
20 other reason is there for strangling someone who has already
21 agreed to have sex except that you find the strangulation
22 sexually exciting. If he wanted to kill her, he would have
23 just kept strangling her. So he wasn't trying to kill her.
24 He let her come back to consciousness and then he moved her
25 and he strangled her again.

1 So we have sadistic elements in the assault. And
2 that is one of the things that Frances who criticizes many
3 things about the way this is diagnosed says that you can use
4 to determine if it's a paraphilic rapist.

5 So we're down to No. four, repetitive patterns.
6 No. three, virtually all of his criminal offending is
7 sexual. He has what I consider a fairly minor nonsexual
8 criminal history, at least in cases of the offenders that I
9 see. We have an assault at fifteen and another assault in
10 part of the domestic violence incident but he does not have
11 a big track record of other criminal offenses.

12 **THE COURT:** Talking about the track record, what is
13 the timeline here from the first sexual encounter, I guess
14 that is in the car --

15 **THE WITNESS:** 1974 to 1987.

16 **THE COURT:** And then the second one is on the canal
17 there in Washington; right?

18 **THE WITNESS:** That's right.

19 **THE COURT:** The pregnant woman.

20 **THE WITNESS:** That's right.

21 **THE COURT:** And the third one is when he invades
22 the house of the person he gave a plant to.

23 **THE WITNESS:** Yes. Although, yes, an alleged rape
24 in between.

25 **THE COURT:** Well, what timeline is that? That is

1 three episodes in what?

2 **THE WITNESS:** 1974 to 1986, '87.

3 **THE COURT:** So does it strike you that that makes
4 someone a sexually dangerous person if they have three
5 episodes in fifteen years, whatever it is?

6 **THE WITNESS:** What it says is that the paraphilic
7 arousal wasn't temporary, that he sustained it over more
8 than a decade and is continuing to through assault which
9 speaks to a --

10 **THE COURT:** Does it argue the other way, the fact
11 that he didn't act on it more than three times, three
12 episodes in -- how many years is that?

13 **MR. SINNIS:** 12 to 13 years.

14 **MR. SAVERY:** 13 years.

15 **THE WITNESS:** He was incarcerated for much of that
16 time. He was incarcerated for one six-year stretch for --

17 **THE COURT:** So take six years out of it. Don't
18 give him credit for anything.

19 **THE WITNESS:** Well, in fact, he raped within a few
20 months of being released on I think two occasions. He
21 actually raped very quickly after release because he was
22 incarcerated first for the first one and then he, when he
23 was released he raped.

24 **THE COURT:** Okay. Go ahead.

25 BY MR. SAVERY

1 **Q.** You can continue with your discussion of Doren's
2 criteria and how you applied it here.

3 **A.** The raping when willing to have consensual sex doesn't
4 apply because the strangers were not willing to have
5 consensual sex. The high frequency has to do with the fact
6 that he did rape very quickly when he was released and he
7 was on supervision, he was raping while he was still on
8 supervision in two instances.

9 The high likelihood of getting caught at three
10 o'clock in the afternoon on a public path. There is a high
11 likelihood of getting caught going to your neighbor's house
12 who knows that you live across the way because you've
13 identified yourself as a neighbor. It is a virtual
14 certainty of getting caught.

15 The consenting sex partner, I believe he told
16 Dr. Mills that he was living with someone at the time, that
17 he lived with her for several years so he had a partner in
18 the home.

19 **Q.** I am sorry, can I stop you there.

20 Can you explain that a little further. He had a
21 partner in the home at the time he offended?

22 **A.** Yes, he had a partner in the home so he -- if you are
23 just looking for sex, you just want sex, he has someone at
24 home that he is having sex with and is able to have sex with
25 so why do you go out and rape. One reason is consenting sex

1 isn't enough.

2 Various types of victims, he actually doesn't. His
3 victims are pretty much adult females within a narrow range
4 and we don't see any evidence of a rape kit. So certainly
5 he didn't fit all the criteria but he certainly fit --

6 **THE COURT:** I am sorry, your voice dropped. A rape
7 kit?

8 **THE WITNESS:** Yes, he didn't have -- there are
9 rapists who carry masking tape -- duct tape and tools for
10 burglary and things like that just to get in the house. So
11 he did not have a rape kit per se. But then again, this was
12 his first home invasion so he didn't have a set modus
13 operandi.

14 BY MR. SAVERY

15 **Q.** Now, apart from the authorities that recognized the
16 diagnosis which we just spent some time on, are you familiar
17 with the scientific research or analysis that supports
18 generally the existence of this category of paraphilia?

19 **A.** Yes.

20 **Q.** And can you tell us about that, please?

21 **A.** Okay. There are two types of studies and there are a
22 lot of each of them so I'm just going to mention a category
23 and a couple of examples.

24 First of all, there is a long history going back to
25 the '70s of plethysmograph studies. And what those

1 plethysmograph studies show is that in general rapists
2 respond differently than non-rapists to audio descriptions
3 of rape.

4 Now, remember, most of these studies are of rapists
5 as a group and we know that all rapists don't respond
6 differently so for the mean to be higher, you have to have a
7 significant number of rapists who do respond differently.
8 For example, there is the most recent study -- well, first
9 of all, Quinsey and his group have done a series of studies
10 and they reviewed other people's studies as well. And in
11 his 2003 article summarizing the research in this -- and
12 that is on the bib -- Quinsey said, "It is incontestable
13 that rapists differ from non-rapists in their responses to
14 sexual coercive stimuli relative to consensual stimuli in
15 the laboratory studies review."

16 He mentioned that he could, he had only one
17 negative finding in the literature on that.

18 There is also a brand-new 20009 study that just
19 came out. And what --

20 **Q.** I'm sorry. Can you refer to the name of that study,
21 please?

22 **A.** Michaud and Proulx. I have never known how to pronounce
23 his name. Do you want me to --

24 **Q.** Is it P-R-O-U-L-X?

25 **A.** It's M-I-C-H-A-U-D and P-R-O-U-L-X, 2009 *Penile-response*

1 *Profiles of Sexual Aggressors During Phallometric Testing,*
2 *Sexual Abuse: A Journal of Research and Treatment*, Volume
3 21, pages 308 to 334. And that's the *Journal of the*
4 *Association for the Treatment of Sexual Abusers*.

5 And what he says is there was two response groups.
6 61 percent of the sample of rapists had stronger responses,
7 particularly to heated sex, to rape, than did -- they had
8 stronger responses than they did to consenting, particularly
9 to a sexual assault of a female with humiliation and sexual
10 assault of a female with violence. So they had 61 percent
11 of their rapists showed a deviant arousal pattern. Not all
12 of them but a significant percentage of their rapists did.

13 Now, there is another very interesting study by
14 Barbaree and what he looked at was subgroups of rapists.
15 Most of them really haven't focused on subgroups. And what
16 he found was that when you classify them according to
17 subgroups, the sexual subgroup was characterized by a
18 deviant arousal pattern on this plethysmograph, on the
19 plethysmograph.

20 So there is a whole series of studies, it could
21 take a long time to describe, but those are just a couple of
22 examples.

23 In general what they find is that rapists are often
24 aroused to both consenting and nonconsenting sex. And as
25 the suffering gets greater, you actually get a better

1 differentiation of the normal group and the rapist group
2 because the normal group gets less and less aroused as the
3 suffering gets greater and the rapists do not. That's one
4 series of studies we have to know that this is real, that
5 there really are people who have a disordered arousal
6 pattern around rape.

7 The second series or class of studies are the
8 typology studies. And, again, this has been going on for 40
9 years also.

10 And Knight and Prentky have probably the best, most
11 empirically backed typology today. And in 1991 they
12 reviewed the old typologies. And they found in a number of
13 different older typologies that four dimensions were
14 typically seen by clinicians. They include sexualization,
15 sexual fantasies and paraphilias, okay. So they say that
16 rapes are, you can divide them by the amount of aggression,
17 the presence or absence of antisocial personalities, sadism
18 and sexualization.

19 Now, in their modern studies they find that there
20 are different kinds of rapists. There are opportunistic
21 rapists. There are pervasively angry rapists that beat up
22 women and rape women. There are vindictive rapists that
23 don't beat up, they just don't like women very much. And
24 there are rapists with a disordered arousal pattern, some of
25 whom are sadists and some of whom are just sexually

1 attracted to a struggling female who does not want to have
2 sex with them.

3 So if you go to the literature of how do we divide
4 rapists into subgroups, you don't find literature that
5 leaves out this category, that says that there are no
6 rapists that have a disordered arousal pattern.

7 **Q.** Okay. Thank you.

8 Now, are there articles of commentators or
9 professionals who argue that NOS (Nonconsent) is not a valid
10 diagnosis?

11 **A.** Yes. And I think the forerunner of those is probably
12 Zander or the one that is most well known.

13 **Q.** Okay. Now, can you tell us a little bit about Zander
14 and what his position is?

15 **A.** Well, Zander's position, he is against the civil
16 commitment of nonpsychotic sex offenders. He thinks that
17 only, as I understand it, only psychotic sex offenders
18 should be civilly committed. He also questions pedophilia
19 saying that there is certain cultures who support it
20 historically and, therefore, it should not be a mental
21 disorder.

22 He also doesn't agree with Paraphilia NOS. He also
23 claims --

24 **MR. GOLD:** Your Honor, I'm going to object to this.
25 She seems to be just describing his views and not his work,

1 for example, this comment about pedophilia or --

2 **THE COURT:** Well, we did cover that in my last case
3 so we don't have to hear about it again.

4 Why don't you go ahead.

5 **MR. SAVERY:** Okay.

6 BY MR. SAVERY

7 **Q.** Well, can you tell us, if you can cut to the chase on
8 Zander's view regarding NOS (Nonconsenting), can you tell us
9 a little bit about his position there and whether or not you
10 are convinced by him?

11 **A.** I am not -- as I understand his position, his position
12 is that it should not be used in civil commitment cases.

13 **MR. GOLD:** And, again, just on foundation, Your
14 Honor, how she knows about his position --

15 **THE COURT:** Well, you can have a chance to ask all
16 the questions you want in a short time.

17 **MR. GOLD:** Okay.

18 **THE COURT:** She is fielding them one at a time.

19 **A.** He has a section in his article --

20 **Q.** Can you tell us which article that is?

21 **A.** "Civil Commitment Without Psychosis, The Law's Reliance
22 On The Weakest Links In Psychodiagnostics."

23 **Q.** Okay.

24 **A.** From the *Journal of Sex Offender Civil Commitments,*
25 *Science and Law.* He claims in this that Dennis Doren made

1 up the diagnosis.

2 **THE COURT:** Who made it up?

3 **THE WITNESS:** Dennis Doren. And, of course, Dennis
4 Doren wasn't on the Work Committee for DSM-IV or DSM-III
5 which put this diagnosis in. And Doren has since published
6 an article called, "Setting the Record Straight" in which he
7 made it clear that what he made up was some criteria to help
8 distinguish this from other conditions but that, of course,
9 this diagnosis preceded Dennis Doren by a long -- by many
10 years.

11 **Q.** Okay. And are you familiar with the work of Dr. Frances
12 on this issue of Paraphilia NOS (Nonconsent)?

13 **A.** Yes.

14 **Q.** Can you tell us a little bit about that?

15 **A.** Frances was on, was the editor of DSM-IV I believe, not
16 DSM-IV-TR but DSM-IV. And Frances is a pretty serious
17 critic of the way this is diagnosed and says a number of
18 negative things about the way that this is diagnosed.

19 But nonetheless this is from an article called,
20 "Defining Mental Disorder When It Really Counts, DSM-IV-TR
21 and SVP/SDP Statutes." And that was in the *Journal of the*
22 *American Academy of Psychiatry and the Law* in 2008.

23 And, nonetheless, what he says is this diagnosis
24 Paraphilia NOS is given to distinguish the criminally
25 inclined individual who rapes as part of the broad

1 repertoire of illegal activities from the rapist driven by
2 deviant sexual urges, namely, arousal to coercion.

3 Let's see.

4 **THE COURT:** Arousal to coercion you said?

5 **THE WITNESS:** To coercion -- the diagnosis is given
6 to distinguish the two.

7 **THE COURT:** Oh, I see.

8 **THE WITNESS:** Okay. And then it says what Frances
9 is opposed to again is diagnosing it just on the basis that
10 he's raped a lot of people so he must be a paraphilic.

11 "While there may be cases," this is a quote, "where
12 the diagnosis is justified, purely on the basis of rape
13 behavior, it was never intended to convey that the acts
14 alone would be paraphilic. Some rapists may be triggered by
15 opportunity, others may occur in the context of
16 intoxication, related disinhibition and some may reflect
17 character disorder or nonparaphilic pathology."

18 And then he goes on to say, "This distinction does
19 not mean that Paraphilia NOS cannot or should not be used to
20 describe some individuals who commit coercive sexual acts.
21 However, such diagnosis would require considerable evidence
22 documenting that the rapes reflected paraphilic urges and
23 fantasies linking the coercion to the arousal."

24 And then a little later, "Either is inferred by the
25 acts perpetrated on the victim or by the interview

1 information." And he goes on to say, "One type of evidence
2 to consider is whether there are sadistic acts present."

3 And he goes on to say, "It is possible that the
4 repetitive expression of sadistic behaviors, for example,
5 domination, strangulation, beatings and a particular case of
6 a serial rapist may well warrant the diagnosis of Paraphilia
7 NOS with sadistic traits when there is insufficient evidence
8 to support the criteria for sexual sadism."

9 And that's exactly the situation in this case. So
10 Frances is considered a great critic. But when you read
11 Frances, what you see is Frances is opposed to this
12 diagnosis based on acts alone but does not question whether
13 there is a real disorder or whether it can be diagnosed as
14 Paraphilia NOS.

15 **Q.** Okay. Thank you, Doctor.

16 Have you previously diagnosed anyone with
17 Paraphilia NOS (Nonconsent)?

18 **A.** Yes.

19 **Q.** In support of commitment?

20 **A.** Yes.

21 **Q.** And how many times would you say you have diagnosed
22 someone with that disorder?

23 **A.** I don't know. I didn't -- it's not a frequent
24 diagnosis.

25 **Q.** Have courts accepted your opinion?

1 **A.** Yes. And not just mine. This is a common diagnosis as
2 evidenced by the research.

3 **Q.** Okay. And has a court ever rejected the diagnosis that
4 you have rendered in a commitment case that the subject
5 should be diagnosed with Paraphilia NOS (Nonconsent)?

6 **A.** Not yet.

7 **Q.** And are you aware of other jurisdictions that have
8 accepted the diagnosis?

9 **A.** Yes. There are studies of Arizona and there are studies
10 in Washington State. In Arizona Paraphilia NOS was
11 diagnosed in 56 percent of the cases of SDPs.

12 In Washington State it was diagnosed in --
13 paraphilia -- I'm sorry. Yes, in Washington State it was
14 specifically Nonconsent Paraphilia, it was diagnosed in 42,
15 43, 42.6 percent of the cases.

16 **THE COURT:** Of what? What are you talking about?

17 **THE WITNESS:** I am talking about two pieces of
18 research. One is an article by Jackson, Rebecca Jackson and
19 Henry Richards called, "Diagnostic and Risk Profiles Among
20 Civilly Committed Sex Offenders in Washington State." This
21 was the *International Journal of Offender Therapy and*
22 *Comparative Criminology*, 2007. And they gave a diagnostic
23 summary in which they listed the different diagnoses that
24 they had found in their review of cases in Washington State.
25 And Nonconsent Paraphilia was diagnosed in essentially 43

1 percent of the cases.

2 The second article --

3 **MR. SINNIS:** Excuse me. Can the government provide
4 us a copy of what she is reviewing, because we have not seen
5 it?

6 **MR. SAVERY:** Sure.

7 **THE COURT:** Okay.

8 **A.** The second article was by Judith Becker who consults to
9 their SVP program, Jill Stinson, Shannon Tromp, T-R-O-M-P,
10 and Gene Messar, M-E-S-S-E-R, called, "Characteristics of
11 Individuals Petitioned For Civil Commitment." And that was
12 from the *International Journal of Offender Therapy and*
13 *Comparative Criminology*. And that was a 2003 article. And
14 in that 56 percent of the cases were diagnosed with
15 Paraphilia NOS.

16 **Q.** Okay.

17 **A.** Now, that doesn't say nonconsent. Some of those might,
18 some rare ones might have been necrophilia or something
19 else.

20 **Q.** Okay. Now, have you ever assessed a repeated rapist as
21 not being diagnosed with Paraphilia NOS (Nonconsent)?

22 **A.** Yes.

23 **Q.** More than once?

24 **A.** Yes.

25 **Q.** And how would you distinguish those types of cases where

1 you have rendered that opinion from what we are dealing with
2 here?

3 **A.** Well, in the ways that I just described. I look at the
4 behavior and I look at all possible explanations for the
5 behavior that I can find. And I try to see if there is an
6 alternative explanation other than Paraphilia NOS.

7 And I also look at any available literature about
8 how to make the distinction, Doren says the most thorough
9 one, so I look at the criteria he has set, look at the issue
10 of sexual sadism that Frances raised and try to make a
11 determination whether this behavior reflects some underlying
12 sexual attraction to rape or not.

13 **Q.** Okay. Is Paraphilia NOS (Nonconsent) a mental illness,
14 abnormality or disorder in your opinion?

15 **A.** Yes, it's clearly a disorder because it's in the DSM-IV.

16 **Q.** And in the case of Mr. Graham does this paraphilia
17 diagnosis represent a serious mental illness, abnormality or
18 disorder?

19 **A.** Yes, it's definitely serious. It's interfered with his
20 liberty for most of his life and so it has impaired his
21 occupational and social functioning extremely and certainly
22 had a devastating impact on the victim.

23 **Q.** Now, are you familiar with Dr. Mills's views on the
24 issue of whether paraphilia can never qualify as a serious
25 mental illness, abnormality or disorder?

1 **A.** Yes.

2 **Q.** And what is his position on that?

3 **A.** I think he finds that neither the personality disorders
4 nor the paraphilias can qualify.

5 **Q.** Do you agree with that?

6 **A.** No.

7 **Q.** Why not?

8 **A.** I don't know on what basis anyone can make that claim.

9 Something that impacts your own life the way this has
10 impacted Mr. Graham's, something that can cause such harm to
11 victims and cause a host of psychological disorders and in
12 some cases lead to death, sexual sadism isn't serious?

13 It's a paraphilia that causes someone to strangle a
14 woman unconscious three times isn't serious? In what sense
15 does the word "serious" have any meaning if these things
16 aren't serious.

17 **Q.** Now, did you also consider a possible diagnosis of
18 Paraphilic Sexual Sadism?

19 **A.** I didn't --

20 **THE COURT:** Let me ask you this.

21 But is it true that if it isn't in the DSM-IV
22 manual that the balance, the majority of professionals don't
23 regard it as a dangerous condition, a sexually dangerous
24 condition?

25 **THE WITNESS:** No, it was excluded specifically, and

1 the people who were there say this, because they were afraid
2 of the political repercussions that rapists would use --

3 **THE COURT:** Regardless of the motive, if it is not
4 in the book, it doesn't count as far as the majority of your
5 highly respected peers; isn't that right?

6 **THE WITNESS:** No, that actually isn't right.
7 Psychopathy, for example, has not ever made it to DSM-IV
8 series and yet it is entirely accepted throughout the field
9 and has a phenomenal amount of research on it.

10 **THE COURT:** Well, people may accept it but that
11 doesn't mean that they regard it officially as a sexually
12 dangerous condition? Unless it has got that stamp, the
13 DSM-IV stamp?

14 **THE WITNESS:** Well they typically stick with DSM-IV
15 or the DSM-IV-TR for the diagnosis of it. So that's why the
16 head of DSM-IV has said clearly that you can use this
17 diagnosis for that condition.

18 So they stick with it for that but there are
19 conditions and syndromes that everybody recognizes and
20 utilizes in their work that they don't treat as a diagnosis
21 but that everybody knows they're real and has phenomenal
22 reliability for that.

23 BY MR. SAVERY

24 **Q.** And would those be viewed as illnesses, abnormalities or
25 disorders?

1 **A.** I haven't seen anybody try to use them as a basis of an
2 SVP diagnosis. For example, psychopathy isn't in DSM-IV but
3 we use it in risk assessment all the time because it has the
4 highest correlation of violence than anything.

5 But for SVP work people tend to stay with the
6 DSM-IV and the diagnoses that are within DSM-IV, for the
7 diagnostic part.

8 **Q.** And can you explain for us, please, which particular
9 diagnosis in DSM-IV applies to Mr. Graham's paraphilia?

10 **A.** Well, Paraphilia NOS. I don't think there is any real
11 doubt about that. Even the people typically who criticize
12 it, First and Frances both acknowledge that it can and
13 should be used in certain circumstances for certain people
14 for exactly that request.

15 **Q.** Now, did you consider a possible diagnosis of Paraphilic
16 Sexual Sadism?

17 **A.** I did.

18 **Q.** And what is that disorder?

19 **A.** Sadism is sexual arousal to pain, suffering, terror or
20 humiliation. It isn't just through a struggling female who
21 doesn't want to have sex with you. It's specifically the
22 suffering. In its more advanced forms it results in
23 torture.

24 **Q.** And why did you consider it here?

25 **A.** He strangled her three times and brought her back, let

1 her come back each time after he had subdued her. What
2 other explanation is there except that it was part of his
3 sexual arousal. He also raped her after the third
4 strangulation so the strangulations did not inhibit the
5 sexual arousal. They were actually apparently some kind of
6 foreplay.

7 **Q.** What did you conclude with respect to the potential
8 diagnosis of Sexual Sadism?

9 **A.** That he was arrested right afterwards so there was no
10 ability to establish the six-month timeline which is part of
11 the criteria so I stuck with the -- even the DSM-IV says in
12 certain circumstances you can take liberties, I stuck with
13 the criteria. I didn't give him a separate diagnosis of
14 Sexual Sadism because we only had one incident and I
15 couldn't see a pattern from one incident. But I did, I do
16 believe that those acts were sadistic in that particular
17 rape.

18 **Q.** And what implications does that add to your assessment
19 in this case?

20 **A.** Well, the one thing, it is important in evaluating what
21 is pushing the rapes because sexual sadism is clearly a
22 disordered arousal pattern. And if you are simply raping
23 for an antisocial reason, you would have no reason to
24 strangle her unconscious three times.

25 So it speaks to a disordered arousal pattern. It

1 also speaks to the fact that I don't believe it is the
2 antisocial behavior that is driving the rapes because that
3 should have been dropping out. Instead the strangulations
4 are clearly in escalation from previous behaviors. It is
5 the most violent, the last one was the most violent assault
6 yet so he is getting older but the rapes aren't getting less
7 violent. The rapes are getting more violent.

8 **Q.** Okay. And has Mr. Graham been diagnosed with any
9 substance abuse disorders?

10 **A.** Yes.

11 **Q.** Can you tell us about those, please?

12 **A.** Well, he has heroin, he has used heroin in the past and
13 also marijuana and PCP and wanted to use them badly enough
14 to use them on, when he was under supervision and gave a
15 urine test would speak to they're a bad problem with them.

16 **Q.** Okay. And what implications do those diagnoses have for
17 your assessment in this case?

18 **A.** I don't think they have a lot of implication because I
19 don't think the drugs are pushing this thing. I think that
20 if he were not taking the drugs he would still be at risk.
21 There isn't a lot of evidence that he was incapacitated from
22 the drugs and drug offenses.

23 **Q.** Now, the Adam Walsh Act uses the term "suffers from" in
24 regard to serious mental illness, abnormality or disorder.

25 **A.** Right.

1 **Q.** Are you familiar with that?

2 **A.** Yes.

3 **Q.** Okay. Did you consider Dr. Mills' views on the term
4 "suffers from"?

5 **A.** I considered it.

6 **Q.** Okay. Can you tell us your understanding of what his
7 views are and what your thoughts are?

8 **A.** As I understand it, he appears to be saying that if the
9 individual doesn't suffer from the behavior himself, if he
10 enjoys raping people, for example, then he cannot be
11 diagnosed as -- he cannot be civilly committed because the
12 disorder doesn't cause him to suffer.

13 I can only say that that is completely out of line
14 with any ruling in any court that I am familiar with. If
15 that were the case, then the Legislature, if that was their
16 intent, they wouldn't be saying that only those sex
17 offenders who could be civilly committed who felt remorse
18 and guilt but that sex offenders who didn't feel remorse and
19 guilt and were happy to continue their behavior could not be
20 civilly committed.

21 There is no court I have ever seen that has taken
22 that view.

23 **Q.** And apart from any courts and what their views might be
24 on this, as a professional in your field, what do you
25 understand the term "suffers from" to mean?

1 **A.** The term "suffered" is commonly used to mean has the
2 condition of. So I think in my report I said, for example,
3 the saying "He suffers from being too proud" doesn't
4 indicate that he is suffering because he is proud. It
5 indicates that he has the condition of being too proud. If
6 you look it up in the dictionary, it says that, that one of
7 the definitions of "suffers" is to have the condition of
8 something.

9 **Q.** Now, to move on to your next opinion here, have you
10 reached an opinion to a reasonable degree of professional
11 certainty that Mr. Graham as a result of a serious mental
12 illness, abnormality or disorder would have difficulty in
13 refraining from sexually violent conduct if he's released?

14 **A.** Yes, I believe he would.

15 **Q.** And can you describe for us how you went about reaching
16 your conclusion on that issue?

17 **A.** Well, for regular normal people, what controls their
18 behavior is the fact that they usually do not have any
19 intense overwhelming urge to engage in behavior. And that
20 if, for example, they would consider raping someone, they
21 also have brakes. And those brakes are in the form of
22 empathy, compassion and taking other people's point of view.
23 And they are affective components. Empathy is not just a
24 cognitive thing. It is an affective reaction to other
25 people suffering.

1 Most people if they see someone being strangled,
2 for example, would be extremely upset and get a negative
3 visceral reaction to that. This is where the Antisocial
4 Personality Disorder is important because it is not simply a
5 list of unlawful behaviors, it also describes a reckless
6 indifference to people's safety. It describes a remorseless
7 personality who does not feel the normal empathy and
8 compassion that other people feel.

9 Now, Mr. Graham has Antisocial Personality
10 Disorder. And quite specifically he meets those
11 characteristics. There is no evidence in the record of his
12 having a negative reaction to a victim suffering. In that
13 last and most advanced rape, we saw that he strangles her
14 and she came back. She couldn't even stand up and he
15 strangles her again at some point.

16 So his personality characteristics do not have the
17 normal controls built in that would allow him to resist
18 impulses. He also has a deviant arousal pattern in my
19 opinion that is pushing him to commit these acts. So he has
20 both an accelerator that is going to make it hard for him to
21 control his behavior. And he has an absence of brakes that
22 are going to make it hard for him to control his behavior.
23 Even if he wants to control his behavior, he has to deal
24 with urges that most people do not have to deal with in
25 their lives. And he doesn't have the built-in mechanisms

1 that allows him to resist those urges. So I think he is
2 going to have difficulty.

3 **Q.** Okay. Can you tell us what an actuarial instrument is?

4 **A.** The actuarial instruments are methods of assessing risk
5 in sex offenders. And prior to their invention, to assess
6 risk in a sex offender you sat down and interviewed the sex
7 offender and then came up with an opinion of how risky you
8 thought his were.

9 The research indicated that this actually was a
10 really poor way to assess risk. That the people clinicians
11 thought would reoffend often didn't. The people they didn't
12 think would reoffend often did. There was just no good
13 correlation with reoffending.

14 In response to that they tried a different
15 approach. The actuarial instruments are much like the
16 insurance tables that -- actuarial tables that insurance
17 companies use. If you go in for insurance, they want to
18 know some information, male or female, how old are you, do
19 you have a history of heart disease, do you have a history
20 of -- how long did your parents live?

21 Now, the reason they ask these questions are
22 because these are items that they know are associated with
23 early death. And as a result of all that, they're going to
24 put you in a box and it's going to say 30-year old male,
25 healthy, no previous history, or it may say 70-year old

1 female, bad heart condition. And they're going to set your
2 rates accordingly. Because they know that they're going to
3 be, different percentages of people are going to die in
4 those two categories.

5 The actuarial instruments all have this in common.
6 They have a series of variables that have been identified as
7 associated with risk. You get scored based on how many of
8 those variables you have. Then they have done research that
9 shows how many people with a score of zero reoffended. And
10 then it is five years, ten years, fifteen years. How many
11 with a score of one, how many with a score of two, all the
12 way up to the top of the scale. And different instruments
13 have different numbers of potential points.

14 So I scored the three main actuarial instruments in
15 use today.

16 **Q.** Can you tell us what those are?

17 **A.** The most common actuarial instrument is Static-99. And
18 in one of the surveys of civil commitment states, 95 percent
19 of the evaluators use it.

20 **Q.** Okay.

21 **A.** With it being required in some states.

22 **Q.** Now, what can you tell us about cross-validation as that
23 concept relates to the Static-99?

24 **A.** Well, the last time I reviewed it there were I think 63
25 studies but that has been a couple of years ago so it has

1 been extensively cross-validated, not just in this country
2 but in England and New Zealand and a host of other
3 countries.

4 **Q.** Now, are you familiar with the term "confidence
5 interval" as it's used in regard to actuarial instruments?

6 **A.** Yes.

7 **Q.** Can you describe that concept to us and how it relates
8 to the Static-99? And I'll refer you to Exhibit 19.

9 **A.** If we could survey every sex offender in the world, then
10 we would know exactly what the recidivism rates were. We
11 can't do that so we are going to take the samples. But if
12 take a sample in Wisconsin and take a sample in
13 Massachusetts, we might not get the exact same rate. But
14 what we are going to get if we take enough of those samples
15 is they're going to cluster in a bell-shaped curve.

16 Let's say the true rate of recidivism of all the
17 sex offenders in the world, which we don't have, know, the
18 more studies you take, the bigger your sample size is.
19 They should cluster in a bell-shaped curve around the true
20 rate.

21 The confidence interval is -- but we don't know for
22 any one study whether it's exactly the true rate or whether
23 it's on this side of it or that side of it.

24 The confidence interval tells you the spread
25 between, the 95 percent confidence true rate falls somewhere

1 between these two numbers.

2 Q. Okay. And can you tell us what is contained in Exhibit
3 19?

4 A. Well, Exhibit 19 are the new -- the old norms and the
5 new norms for Static-99 --

6 Q. I'm sorry. Can you tell us what a norm is?

7 A. When they do these studies, they take a large number of
8 offenders and they see how many, some of them get zero, some
9 get one, some get two, different scores on the test. Then
10 they see how many of that group reoffend as measured by
11 reconviction within a set period of time.

12 So that for other people who use these norms, those
13 considered norms, I can look at that table and I can say
14 this gentleman had a four. Of the people who had a four
15 this percentage reoffended over five years, ten years,
16 fifteen years, whatever the rate is.

17 Q. You mentioned Exhibit 19 contains old norms and new
18 norms. Were the norms recently updated?

19 A. They were. In the middle of this case the norms were
20 updated. When I wrote my first report, we were still
21 working on the old norms. Then in October last year the
22 makers of the Static-99 along with a new researcher Paul
23 Helmus presented new norms at the Association for the
24 Treatment of Sexual Abusers based on larger sample sizes.
25 So the field has largely converted to the new norms.

1 **Q.** Okay. Has the Static-99 gained acceptance in the
2 psychological and psychiatric community?

3 **A.** Well, yes, to the point that the actuarial instruments
4 are now required by the Association of the Treatment of
5 Sexual Abusers in their standards of practice. Because the
6 evidence is so strong, that they are better predictors than
7 clinical assessment is.

8 **Q.** Okay. And did you score Mr. Graham using the Static-99?

9 **A.** Yes.

10 **Q.** And I am putting up on the screen now the first page of
11 Exhibit 23. Can you tell us what this is?

12 **A.** That is my summary of my scoring for the Static-99 of
13 Mr. Graham.

14 **Q.** Okay. And can you explain how you went about scoring
15 him and what the score was that you gave him?

16 **A.** There are ten different items on the Static-99. And the
17 first is age. Age is built in in that in their studies
18 offenders 25 or younger had or 24 up to 25 reoffended more
19 than offenders older than that.

20 So if you are young, you get a point. If you are
21 over 25, you get a zero.

22 The second item is ever lived with a lover for two
23 years. For reasons that we don't entirely understand, it
24 appears to be a protective factor. Individuals who have
25 lived with someone for two years or longer are less likely

1 to reoffend.

2 My understanding is that Mr. Graham did live with
3 someone for at least seven years, possibly longer, so he got
4 a zero on that as well.

5 The third item is index not sexual violence. And
6 that is was the person so violent in the recent and the last
7 assault that they got a point -- that they got a separate
8 charge or got a separate conviction for violence. An
9 example might be kidnapping and sexual assault or murder and
10 sexual assault.

11 He was extremely violent but it does not show up on
12 the scoring because the scoring rules require that he be
13 charged with it and he was not given a separate charge so he
14 gets zero on that.

15 The fourth one is previous nonsexual violence, any
16 conviction. And that is has he ever had an assault
17 conviction. And he has. He has had several assault
18 convictions so he gets a one on that.

19 The next item is prior sexual offenses. And you
20 get up to three points on this particular item. If he has
21 no prior sexual offenses, he gets a zero. If he has had
22 either one to two charges or one conviction, he gets a one.
23 If he has had three to five charges or two convictions, he
24 gets a two.

25 And if he has six plus charges or four previous

1 convictions, he gets three.

2 And he has a two on this because he has two prior
3 convictions. Assault with intent to commit rape is
4 considered a sexual -- is a sexual conviction because he
5 didn't have to succeed in order for it to count. And, of
6 course, he had one prior to that.

7 Prior sentencing dates. If you have three or less
8 of any kind, for anything, for theft, for sexual offenses,
9 for anything, you get a zero. And if you have four or more,
10 you get a one. And he's had four or more so he gets a one.

11 Any convictions for noncontact sex offenses. That
12 refers to things like exhibitionism, for example. You don't
13 touch a victim. And he has not had that so he gets a zero.

14 Any unrelated victims, that is, victims outside of
15 his family. Zero for none, one for, if he's had even one.
16 And all of his offenses, all of his victims have been out of
17 his family so he gets a one.

18 Any stranger victims, a zero for none and one if he
19 has had any. And he has had two, probably three, depending
20 on how long the first victim knew him. But certainly the
21 woman on the path didn't know him previously nor did the
22 victim of the last assault so he gets a one.

23 Any male victims, he gets a zero -- if he had any,
24 he would get a one because, especially men who molest
25 children, the ones who molest male victims reoffend more.

1 But this is an adult rapist and they rarely rape
2 males so he would get a zero.

3 **Q.** And so what score did you ultimately give Mr. Graham?

4 **A.** Six.

5 **Q.** Now, before we get to the meaning of that, did Dr. Mills
6 also score Mr. Graham on the Static-99 using the Static-99?

7 **A.** Yes.

8 **Q.** And what score did he give Mr. Graham?

9 **A.** I believe he got a six also.

10 **Q.** Okay. Can you tell us what the significance is of a
11 score of six?

12 **A.** Well, in the old norms that was actually the top
13 category. In the new norms, six and above they have
14 differentiated with all the way up to as high as you can go
15 because they had enough numbers to separate them out. But
16 it is a score that is associated with a 37 percent
17 reconviction rate for new sexual offense within the first
18 ten years. That's according to the new high-risk norms.

19 **Q.** And did you also consider risk of recidivation between
20 that ten-year period?

21 **A.** Well, I did.

22 **Q.** Why did you do that?

23 **A.** Well, you do it routinely because the norms -- every
24 actuarial instrument has a limited follow-up period but the
25 law does not ask the question of when he will reoffend in

1 the first five years or the first ten years. The law
2 typically has to do with does he have the likelihood of ever
3 committing a new sexual offense.

4 Q. Okay. And what did you determine as you extended out
5 your analysis beyond ten years?

6 A. Well, if you want to extend it, it is a fair question to
7 raise given his age, if you want to extend it, it looks like
8 the ten-year rates are about 70 percent of the long-term
9 rates.

10 Q. Now, do the percentages associated with the various
11 scores in the Static-99, do they accurately estimate the
12 risk of reoffense versus rearrest or reconviction?

13 A. Well, these norms are based on rearrest. Some of the
14 samples have rearrest and some have reconviction.

15 Q. And what does that tell us as compared with the concept
16 of reoffense?

17 A. Well, it is generally accepted that offenders don't get
18 caught for everything they do. In fact, based on his
19 research Able thought the chance of getting caught for
20 sexual offense was about three percent. People argue over
21 that about how many more offenses occur than people get
22 caught for. But there is no dispute that we don't catch
23 everybody for everything that they do.

24 So it is clear that this, these figures are floor
25 figures. They're not ceiling figures. They are the minimum

1 number of offenses. And we know that there are undoubtedly
2 people in those norming groups who had offenses that they
3 didn't get caught for so it doesn't measure the offending,
4 it just measures rearrest and conviction.

5 **THE COURT:** So help me out. Without going into the
6 whole thing, what does this six represent?

7 **THE WITNESS:** The six is the score he got and it's
8 the --

9 **THE COURT:** No, I understand; but what is it? How
10 do I translate that into what? Danger?

11 **THE WITNESS:** You translate that into a 37 percent
12 rearrest rate. Of the people who had his score, 37 percent
13 were either rearrested or reconvicted for a new sexual
14 offense in the first ten years of release. That's what it
15 means.

16 **THE COURT:** Okay.

17 BY MR. SAVERY

18 **Q.** Now, how do actuarials compare with purely clinical
19 assessments in terms of accuracy?

20 **A.** They, on average they tend to meet that. Some of the
21 studies of clinical assessment show that some people get it
22 right and they are -- some of the studies show clinical
23 assessment is almost as good as an actuarial but not better.
24 Some of the studies show that a clinical assessment is no
25 better than flipping a coin. And there are studies that

1 show that it is worse than flipping a coin, that they
2 actually get the wrong people released. It's called the
3 "wrong people," it's high risk.

4 So there is great variability in clinical
5 assessment. And there is no way to know how good your
6 clinical assessment is because nobody follows the results of
7 the clinical assessment. We don't know how many of the
8 people that are called high risk by clinical assessment
9 reoffend or how many of the people that are called low risk
10 don't.

11 Q. Okay. Now, you mentioned two other actuarial
12 instruments you used to score Mr. Graham or to assess his
13 risk of recidivism. And I'm showing you the first page of
14 Exhibit 24.

15 What actuarial tool does this relate to?

16 A. That relates to the Minnesota instrument which was
17 developed for SDP purposes in Minnesota by Doug Epperson and
18 Stephen Huot.

19 Q. And how is this different from the Static-99? What does
20 it add to the equation?

21 A. Well, it's a different instrument. It has some similar
22 variables and it has some different variables but it's also
23 been shown to correlate with reoffending.

24 Q. Okay. And without going through every category on this,
25 can you tell us how you scored Mr. Graham?

1 **A.** In much the same manner as the Static-99, I went through
2 each of the items. I'll just give a couple of examples.
3 For example, number of sex, sex-related convictions,
4 including current. That's how they do it. Only one
5 conviction, his current conviction, would be a zero. If the
6 offender has two or more, it would be a plus two.

7 This instrument is different from the Static-99 in
8 that the weights for this instrument were derived
9 empirically. In other words, they looked at the percentage
10 of people who reoffended who had only one conviction and
11 then they looked at the percentage of people who reoffended
12 who had two or more. And for every five percentage points
13 difference they gave one point. So this means -- the fact
14 they had a plus two means that the ones who had two or more
15 convictions had a ten percent higher reoffense rate than the
16 ones who had no other, no other convictions.

17 **Q.** Okay. And what did you ultimately score him with on
18 this tool?

19 **A.** Well, he scores a plus 11. There is a little bit of
20 controversy in that he probably should be a plus 12 because
21 there is one item where I scored conservatively where
22 actually Epperson I think would have given him an additional
23 point. But I changed it because it doesn't matter. It's in
24 the same risk category with either 11 or a 12.

25 **Q.** Okay. What is the significance of a score of 11 on this

1 actuarial?

2 **A.** Now, this has not been renormed and it may be at some
3 point. In fact, it probably will be at some point. But
4 according to the current norms, 57 percent of offenders with
5 this score were rearrested for a new sexual sentence within
6 the first six weeks.

7 **Q.** And is the MnSOST-R a tool that is used or is it widely
8 accepted in your profession as a means for assessing risk?

9 **A.** It is. It's not as widely accepted as the Static-99
10 because it has fewer research studies to back it. And many
11 clinicians do not use it alone. They only use it in
12 conjunction with the Static-99.

13 And I need to say that the new norms are expected
14 to be somewhat lower because it looks like overall sexual
15 recidivism rates have dropped over time. We don't know how
16 much lower those norms will be until they come out.

17 **Q.** Okay. Finally, turning to RRASOR, what is RRASOR?

18 **A.** The RRASOR?

19 **Q.** Yes.

20 **A.** The RRASOR is Rapid Risk Assessment for Sex Offense
21 Recidivism. And it was actually the first one that came
22 out. It came out in 1996 by Karl Hanson. And it had only
23 four items on it.

24 **Q.** Did you score Mr. Graham using the RRASOR?

25 **A.** I did.

1 **Q.** What score did you give him?

2 **A.** He scored a three.

3 **Q.** And can you tell us what significance the score of three
4 has?

5 **A.** A score of three, let me get it exactly.

6 A score of three. It's associated with a 37
7 percent reoffense rate in the first ten years of release.
8 That has not been renormed either.

9 **Q.** Okay.

10 **A.** At this point.

11 **Q.** Can you tell us what role these actuarials played in
12 your assessment of Mr. Graham's risk of reoffense?

13 **A.** Well, I started the actuarial instruments and then you
14 look to see if there are any other factors which should be
15 considered. For instance, poor health, for instance, age,
16 for instance, treatment, those are three that are routinely
17 looked at.

18 **Q.** What did you consider with respect to the first of
19 those, his health?

20 **A.** He appears to be in good health.

21 **Q.** And how about the second item?

22 **A.** The second item -- well, there are three items.
23 Treatment, he appeared not to have cooperated with
24 treatment. That doesn't mean -- that I would not lower his
25 risk assessment based on successful completion of treatment

1 which we do sometimes because we know treatment will impact
2 recidivism.

3 And the third item is age. And I looked at that
4 pretty extensively.

5 Q. Okay. Can you describe for us the status of the
6 research on age and its effect on predicting risk of
7 reoffense?

8 A. The age research is almost entirely in my opinion
9 contradictory at this point in time. You could separate
10 out, for any position you have on age you can find an
11 article which will support it. But it would not be a fair
12 presentation to pick one article or the other. The truth is
13 when you have articles such as Barbaree's, and I believe
14 Dr. Mills referred to that, which shows an almost straight
15 line of decreasing with age. We also have research like
16 Thornton and Doren which showed that that disappears if you
17 divide them into high risk and low risk and that all the way
18 through age 59 the high-risk offenders did not drop, did not
19 decrease their offending. That's as far as the study.

20 We also have research like that by Fazel (ph.) who
21 found that the highest recidivism rates were those who were
22 under 25, that those who were between 25 and 39 and the
23 group that was 55 plus were in between the group that was
24 under 25 and the group that was 40 to 54 and that the lowest
25 recidivism rates were the group that was 40 to 54. In other

1 words, it went up and down.

2 We have research by Langton that shows a plateau
3 from 18 to 39 and then it dropped off that to 45. We have
4 research by Knight and Thornton which showed that there was
5 no statistical relationship with age.

6 We have research, a reevaluation of some of
7 Prinzi's research which showed that for rapists that
8 decreased in age, with age for rapists disappeared after the
9 first ten years. His claim is that Prentky didn't talk
10 about that but actually the dropping rapists rates are for
11 the first ten years and then they do not decrease again.

12 And we have Rice and we have Knight and Thornton
13 saying that there is a possibility that aging in prison
14 affects people differently than aging outside of prison.
15 And that much of the research is based on British and
16 England -- British and Canadian samples where the sentences
17 are very short. And that the group of offenders who are
18 coming out of those prisons may have served two years or so
19 and that the reason that they're not showing a decrease with
20 aging and recidivism may be, may be because they have a
21 sample that served much longer prison sentences and that the
22 prison sentences are, that that affects age differently.

23 In other words, in this field in all honesty we
24 have people like Barbaree who are saying that age is
25 potentially the most important variable and that there is a

1 straight line decrease in age.

2 We have Doren saying that he does not think you
3 should consider age because in his research the older
4 samples reoffended less because they had lower actuarial
5 scores and that they're not comparing age. They're
6 comparing higher actuarial scores with lower actuarial
7 scores.

8 We hear Harris and Rice saying that they do not
9 believe age, that you should consider age in offending. We
10 have, I mean, the most honest thing I can do is just tell
11 you exactly what the research says, which is there is no
12 consensus on the impact of aging and offending.

13 **THE COURT:** There is no what?

14 **THE WITNESS:** There is no consensus, there is no
15 agreement on the impact of aging and offending.

16 Now, when I was preparing for this, I decided,
17 given all the conflicting research, I actually emailed David
18 Thornton because he is one of the instrument makers of the
19 Static-99 and he is the person who is involved, one of the
20 people in the research.

21 And I asked him a question about this. And I asked
22 a question about in his opinion would a six still qualify
23 for civil commitment. His answer was depending on the case,
24 what other factors would push it up and down. And he also
25 said that he thought you could take off a half a point for

1 an offender's age. I don't know what implication a half
2 point is. But in all honesty there is no agreement at this
3 point on the impact of aging. Anybody who tells you
4 otherwise is presenting one side of the research and not the
5 whole picture.

6 BY MR. SAVERY

7 Q. Okay. Now, you include a graph in your report at page
8 33 and I have put it up on the screen here.

9 A. Yes.

10 Q. Can you tell us what this is and what your source was
11 for this graph?

12 A. This was a presentation that David Thornton and Dennis
13 Doren did at ATSA, the Association for the Treatment of
14 Sexual Abusers. And it has since been written up in an
15 article by Thornton.

16 And what they were showing is that the two lines
17 that go down on the bottom, those are what we might consider
18 lower risk offenders. They define risk by sentencing
19 occasions or sentencing appearances, SA. So that they have
20 offenders who had one sentencing appearance, offenders who
21 had two and offenders who had three. These are sexual
22 offenses. So they're looking at this. It's a rough measure
23 of risk level.

24 And what they discovered was that the pattern of
25 aging is different for the ones who have one and two

1 sentencing occasions, the lower risk offenders, than it is
2 for the high-risk offenders. The high-risk offenders didn't
3 decrease their offending with age. But I did not present
4 this to say that this was the last word.

5 Barbaree has some research in which he found a
6 different point, a new percentage to say that the research
7 that shows that they just dropped like a stone doesn't take
8 into account the risk level of the offenders.

9 **Q.** Okay. And what implications does this research have for
10 your analysis in this case?

11 **A.** Well, I really don't think there is any agreement at
12 this point in terms of the impact of age on offenders. I
13 really don't. I don't think that we would know how to count
14 the impact of aging on offenders.

15 Hanson has said part of the problem may be that
16 what we really should be looking at is not aging, it's the
17 health and vitality of the offender. What people may
18 consider aging effects may be the fact that many people are
19 not in that great of health and as they get more feeble,
20 they have impairments or health problems that they're not so
21 able to reoffend and maybe we should be looking at the
22 health of the offender.

23 I have not adjusted it in any way for age. I just
24 presented all the data.

25 **Q.** Okay. Switching gears, what role, if any, does

1 Mr. Graham's history of substance abuse play in your risk
2 assessment?

3 **A.** Well, I noted it and I wrote about it in the report. I
4 don't think it is the main factor here in this case. I
5 think that sober or not sober, he still presents a risk to
6 reoffend.

7 **Q.** And regarding your finding in that Mr. Graham's conduct
8 displays traits of sexual sadism, what implications does
9 that have in your risk assessment?

10 **A.** Well, that is more significant. I think it is a factor.
11 It strengthens the case. This is a disordered arousal
12 pattern because Sexual Sadism is by definition a disordered
13 arousal pattern. Whether he meets the criteria for the full
14 diagnosis or not, at present he certainly did commit
15 sadistic acts and it supports the diagnosis of Paraphilia
16 NOS.

17 **Q.** Now, you've diagnosed Mr. Graham with both Paraphilia
18 and Antisocial Personality Disorder.

19 What is the relationship between those two
20 disorders with respect to your risk assessment in this case?

21 **A.** There are people who have a paraphilia but they are not
22 antisocial. The paraphilia worries them. In some cases it
23 frightens them. They seek treatment. They don't want to
24 hurt anyone. They feel guilty if they do. And they
25 actively try to control the behavior because of the degree

1 of remorse and guilt that they feel.

2 When you combine the two disorders, you end up with
3 someone who has a motor and no brakes. You have someone who
4 is pushed to commit the offending but who doesn't have the
5 remorse, the guilt, the concern for other people, the desire
6 not to violate other people's rights that someone has who
7 doesn't have that disorder so it exacerbates the condition
8 and decreases volitional control.

9 **Q.** Dr. Salter, what is an executive function test?

10 **A.** It's a test for brain damage.

11 **Q.** Did you see in Dr. Mill's report that he uses that test?

12 **A.** Yes.

13 **Q.** In your experience is that a test that is used in
14 connection with sex offender evaluations?

15 **A.** I have never seen that test used before because it
16 requires a brain damage. And I have never been in any
17 situation for an assessment where brain damage was
18 considered part of an SDP evaluation. The law doesn't
19 require brain damage so far as I know.

20 **MR. SAVERY:** Your Honor, may I have one moment?

21 **THE COURT:** Yes.

22 (Whereupon, counsel conferred.)

23 **MR. SAVERY:** I have no further questions, Your
24 Honor.

25 **THE COURT:** Okay. Do you want to start now or do

1 you want to start tomorrow?

2 **MR. GOLD:** If it's all right with the Court, we can
3 start fresh tomorrow.

4 **THE COURT:** Okay. You get a vote. Would you like
5 to start tomorrow or continue?

6 **THE WITNESS:** Tomorrow.

7 **THE COURT:** Okay.

8 All right. Is it tomorrow we are coming back?

9 **THE CLERK:** Yes, we are.

10 **THE COURT:** All right. Ten o'clock?

11 **THE CLERK:** Ten o'clock.

12 **THE COURT:** All right. We will see you at ten
13 o'clock tomorrow. Okay.

14 **MR. SAVERY:** Thank you, Your Honor.

15 **MR. GRADY:** Thank you, Your Honor.

16 **MR. GOLD:** Thank you, Your Honor.

17 **MR. SINNIS:** Thank you, Your Honor.

18 **THE CLERK:** All rise for the Honorable Court.

19 Court is in recess.

20

21 (WHEREUPON, the proceedings were recessed at 3:50
22 p.m.)

23

24

25

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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DATE: September 17, 2009